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L. J. JURY
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In the
Supreme Court of the United States
OCTOBER TERM, 1958

No. ~~100~~ 40

PHILLIPS CHEMICAL COMPANY, A CORPORATION,
Appellant,
v.

DUMAS INDEPENDENT SCHOOL DISTRICT,
Appellee.

On Appeal from the Supreme Court of the State of Texas

**MOTION OF APPELLEE DUMAS INDEPENDENT
SCHOOL DISTRICT TO DISMISS**

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April 13, 1959

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In the
Supreme Court of the United States
OCTOBER TERM, 1958

No. 769

PHILLIPS CHEMICAL COMPANY, A CORPORATION,
Appellant,

v.

DUMAS INDEPENDENT SCHOOL DISTRICT,
Appellee.

On Appeal from the Supreme Court of the State of Texas

**MOTION OF APPELLEE DUMAS INDEPENDENT
SCHOOL DISTRICT TO DISMISS**

Appellee Dumas Independent School District, pursuant to Rule 16 of the Revised Rules of this Court, moves this Court to dismiss the appeal in this case, on the ground that it does not present a substantial federal question.

STATEMENT OF THE CASE

This case involves the ad valorem taxation by appellee, a political Subdivision of the State of Texas, of the lessee's interest in Cactus Ordnance Works, a plant built and

owned in fee by the United States, but which has been used and occupied by Appellant in its private capacity and in the conduct of its private business, for profit, since August, 1918, under lease from the United States. (Tr. 61-62.)

The lease was executed by the United States pursuant to authority contained in the *Act of August 5, 1947, ch. 493, 61 Stat. 774*. This statute specifically provided that "[t]he lessee's interest, made or created pursuant to the provisions of [this act], shall be made subject to State or local taxation," and such potential taxability is implicit in the terms of the lease itself. (Tr. 111.) The State of Texas thereafter provided for such taxation through the enactment of *Texas Session Laws, 1950, Fifty-First Legislature, First Called Session, ch. 37, p. 105, Article 5248, Vernon's Annotated Civil Statutes*, as amended, effective March 17, 1950.

In 1954, Appellee served notice upon Appellant that its interest as lessee, and its right of use and occupancy, were deemed taxable, and appropriate assessments were made. In its Jurisdictional Statement, Appellant intimates that it was the fee title to the property that appellee attempted to subject to taxation (p. 7), but this was never intended and it is clear that Appellant's officers always understood that it was the lessee's interest that was being assessed (Tr. 317, 320, 322-323, 327-328). Further, the matter of assessment having received the approval of the Supreme Court of Texas, there is no question now presented to this Court concerning this matter. The tax in this case was assessed against Appellant, and was a tax on Appellant's interest

in the subject property, as lessee thereof with the right of use and occupancy in its private capacity and in the conduct of its private business or enterprise.

Appellant brought this suit to cancel the taxes assessed and to enjoin further assessment of similar taxes. The requested relief was granted for the period prior to the enactment of the 1950 amendment to *Article 5248, Vernon's Annotated Civil Statutes*, and Appellee does not here complain of the judgment of the Texas Courts on this point.

This appeal is from the judgment of the Supreme Court of the State of Texas, affirming both lower state courts, and holding:

(a) That *Article 5248* provides for a tax on the right of use and occupancy, measured by the entire value of a property belonging to the United States, if used and occupied by private business and operated for profit, with the tax assessed against such user and operator.

(b) That *Article 7146, Vernon's Annotated Civil Statutes*, by defining real property to include not only land, but "all of the rights and privileges belonging or in anywise appertaining thereto," thereby makes provision for the taxation of the lessee's right of use and occupancy as a type of real property.

(c) That the *Act of August 5, 1947, ch. 493, §6, 61 Stat. 774*, gives the express consent of Congress to such taxation of the lessee's property right of use and occupancy.

(d) The tax imposed does not result in unlawful discrimination against Appellant, under either the state or federal constitutions.

THE FEDERAL QUESTIONS PRESENTED ARE NOT SUBSTANTIAL

The three questions presented by this appeal, as stated by Appellant, all assert the invalidity of the Texas statute, *Article 5248*, under the Constitution of the United States. The first two questions assert such invalidity on the grounds that the statute discriminates against the United States and those with whom it deals, imposes an unconstitutional burden on the activities of the federal government, infringes upon its sovereignty and constitutes discriminatory and arbitrary class legislation against lessees of federal property, thereby violating the Due Process and Equal Protection clauses of the Fourteenth Amendment.

These questions, and each and every phase thereof, have been conclusively answered and settled by this Court in *United States and Borg-Warner Corporation v. City of Detroit*, 355 U. S. 466; *City of Detroit v. The Murray Corporation of America*, 355 U. S. 489; and *United States v. Township of Muskegon*, 355 U. S. 484; and other cases hereafter cited and discussed.

The third question asserts such invalidity on the ground that the Texas statute assesses taxes to Appellant on property not owned by it, but owned by the United States. This question is, at least in part, a question of state law, involv-

ing the interpretation and application of the statute by the state Supreme Court; but to the extent that any federal question is involved, such question has likewise been conclusively settled by this Court in the cases above cited and to be hereafter cited.

None of the questions presented are substantial federal questions. The appeal should be dismissed.

I.

THIS CASE IS GOVERNED BY THE DECISIONS OF THIS COURT IN THE "MICHIGAN CASES"

Appellant contends that the present case presents substantial federal questions not determined by this Court in its decisions of March 3, 1958, in the "Michigan Cases," *City of Detroit v. The Murray Corporation of America*, 355 U. S. 489; *United States and Borg-Warner Corporation v. City of Detroit*, 355 U. S. 466; and *United States v. Township of Muskegon*, 355 U. S. 484. This contention is based upon the proposition that the Texas statute, as construed by the Supreme Court of Texas, so discriminates against the United States and its lessees, in particulars not found in the Michigan statute, as to render the Texas statute unconstitutional and void.

Appellee believes, on the other hand, that there is no unconstitutional discrimination, and that the Michigan cases are controlling, so that no substantial federal questions are presented. The question of discrimination is answered in the next section of this Motion, and the argu-

ments here will be confined to a discussion of the applicability of the Michigan decisions to the present appeal assuming that there is no discrimination.

The facts in the present case are virtually identical to those in *United States and Borg-Warner Corporation v. City of Detroit*, 355 U. S. 466. In each case, the government plant was leased for use in a private capacity, upon a stipulated annual rental. In each case, the state Supreme Court held that the lessee was liable for taxes based upon the value of the leased property. In each case, the appeal to this Court was grounded upon a charge that the statute involved was unconstitutional because it imposed a tax upon government property and discriminated against those using such property.

Such differences as exist in the two cases are to be found in the provisions of the respective statutes. The Michigan statute levies a use or privilege tax as such, while the Texas statute levies an ad valorem tax on the property right of use and occupancy of the property, as a species of real property under the Texas definition thereof. *Article 7146, Vernon's Annotated Civil Statutes*. Whatever name is given to the tax, however, it is clear that the Texas tax and the Michigan tax are identical in practical operation, by virtue of the Texas Court's interpretation of the Texas statute.

The only real difference in the statutes, or the taxes, then, is in the fact that the Texas statute applies only to users of federally-owned tax-exempt property while the

Michigan statute applies to all tax-exempt property. Only if this Court should hold that this circumstance makes for unconstitutional discrimination against Texas lessees of federal property, is there any distinction between the cases. For the reasons set forth in detail hereafter, Appellee believes that there is an adequate basis for the classification adopted, that the Texas statute is a permissible exercise of the taxing power of the State of Texas, and that no substantial federal question is presented by this appeal. Further, by virtue of the express consent of Congress to taxation of "the lessee's interest" in the property in the present case, Appellee believes that the question of discrimination against this lessee of the United States is removed from the case, *Act of August 5, 1947, ch. 493, §6, 61 Stat. 774*. If this is correct, then the *Borg-Warner* case is fully controlling of the present appeal.

II.

THE TAX DOES NOT DISCRIMINATE UNCONSTITUTIONALLY AGAINST THE UNITED STATES AND ITS LESSEES

"Discrimination" and its derivatives are words with both good and bad connotations; one may be praised for being "discriminating" in his choices, based upon his ability to distinguish the subtle differences between things essentially alike, but he may be criticized if his "discrimination" is carried to the point of unfair or injurious distinctions not based upon pertinent classification. So it is with reference to "discrimination" by governmental action. Not all

discrimination is prohibited, and when based upon legitimate classification, it is enough that those in the same class are treated with equality. *Caskey Baking Company v. Commonwealth of Virginia*, 313 U. S. 117.

Thus, the question in cases of this kind is not whether there are distinctions in the tax treatment of the complaining party, but whether such distinctions are based upon reasonable and legitimate grounds. Appellant, in this case, appears to stand upon the proposition that the Texas classification scheme places lessees of federal property in one class and *all* lessees of other types of tax-exempt property in the other class, and that if *any* of the latter class is in any way more favored than the members of the former, then the classification is illegal. Appellee believes, on the other hand, that such broad classification is not required by the Constitution, and that, under the decisions of this Court, the tax here complained of is neither unreasonable, arbitrary, nor illegal.

A. Appellant complains that the tax in this case does not operate equally upon all lessees of tax-exempt property. Since the statute in question applies only to federal property, this proposition is true; but this is not the only tax statute Texas has, and when it is considered in its proper place in the broad scheme of Texas taxation, and in the light of constitutional limitations, the argument of discrimination fades away.

In the first place, much of the property other than federal that is ordinarily exempt from taxation in Texas loses

its exemption when it is not devoted exclusively to the use which gives rise to the exemption, or when it is used with a view to profit:

(1) The exemptions granted to schools and churches are closely limited by the statute itself. *Section 1, Article 7150, Vernon's Annotated Civil Statutes; Red v. Johnson, 53 Tex. 284.*

(2) State-owned farms employing convict labor are subject to taxation by counties and independent school district. *Section 4, Article 7150, Vernon's Annotated Civil Statutes.*

(3) State-owned prison properties are not exempt from payment of taxes for school bonds and school maintenance. *Sections 17, 18, Article 7150, Vernon's Annotated Civil Statutes.*

(4) County school lands are subject to taxation, except for State purposes, by special constitutional amendment and statute. *Section 6a, Article VII, Constitution of Texas; Article 7150a, Vernon's Annotated Civil Statutes;* and the tax lien attaches just as in other cases. *Childress County v. State of Texas, 127 Tex. 343, 88 S. W. 2d 85.*

(5) Lands set apart for the endowment of the University of Texas, an agency of the State, are subject to taxation for county purposes. *Article 7150c, Vernon's Annotated Civil Statutes.*

(6) Leaseholds of otherwise exempt property for terms of three years or longer, and property held under contract of purchase from an exempt owner, are subject to taxation. *Article 7173, Vernon's Annotated Civil Statutes; State of Texas v. Taylor, 72 Tex. 297, 12 S. W. 176.*

(7) Exclusive use for the exempt purpose, and use not with a view to profit, are the standards set up for exemption of virtually every type of exempt property. *Sections 1, 2, 2a, 3, 6, 7, 9, 10, 13, 14, 16, Article 7150, Vernon's Annotated Civil Statutes.*

As the above examples reflect, exemption from taxation in Texas is carefully circumscribed, and much of the property of the State and its agencies is subjected to at least limited taxation. The exemption is taken away when some good reason exists for doing so: for example, when prison farms compete with private farms, or when county and university lands constitute a large part of the wealth of certain areas of the State. Naturally, the self-interest of the State, for itself and its creatures, causes it to be more concerned for its own exemptions than for those of other entities, but this, in itself and within reasonable limitations, is not unconstitutional. "Any classification of taxation is permissible which has reasonable relation to a legitimate end of governmental action." *Welch v. Henry*, 305 U. S. 134, 144; *Watson v. State Comptroller of the State of New York*, 254 U. S. 122, 124.

In its most recent pronouncement on the subject, this Court has recognized the place of "state policy" and "local interests" in determining questions of classification for tax purposes, *Allied Stores of Ohio, Inc. v. Bowers*, U. S. , 79 S. Ct. 437, so that, within proper constitutional limitations, self-interest may provide sufficient grounds for distinction in tax treatment.

B. Appellant argues here, however, that the Supremacy of the United States "and those with whom it deals" outweighs the matter of state policy, and requires a holding that the statute in question is illegally discriminatory solely because it applies only to lessees of federal property. This argument, which constitutes the crux of Appellant's case, is unsound.

1. The tax immunity of the United States does not extend to the private entities with whom it deals, and the enjoyment of a privilege conferred by the federal government upon an individual, even though to promote some federal governmental policy, does not relieve him from the taxation by a state or local government of his property or business used or carried on in the enjoyment of the privilege. *Federal Compress & Warehouse Company v. McLean*, 291 U. S. 17; *Fox Film Corporation v. Doyal*, 286 U. S. 123; *Forbes v. Gracey*, 94 U. S. 762; *Baltimore Shipbuilding & Dry Dock Company v. Baltimore*, 195 U. S. 375; *Susquehanna Power Company v. State Tax Commission of Maryland*, 283 U. S. 291. A tax exemption applicable to the fee in land does not extend to the interest of a lessee, which is a separate and distinct property interest. *Jetton v. University of the South*, 208 U. S. 489.

2. Even if the immunity of the United States might otherwise be deemed to extend to its lessee, Congress has here expressly waived any such claim and has declared that the interest of the lessee shall be made subject to state or local taxation. *Act of August 5, 1947, ch. 493, 61 Stat. 775*. Granted that this statute does not confer a license

upon the states to discriminate against federal lessees, yet if other considerations do not infringe the constitutional limitations on state power, the matters of federal supremacy or sovereignty can not be deemed to be the deciding factor here. State law is controlling with reference to the measure or character of the tax, when the immunity is waived. *Reconstruction Finance Corporation v. Beaver County*, 328 U. S. 204. As this Court stated in the last cited case, if Congress had intended a uniform system of taxation of the taxable interests created, it could have so provided in the statute; and, of course, the interest of the lessee does not receive uniform treatment at the hands of the states. Cf. *Grumman Aircraft Engineering Corporation v. Board of Assessors of the Town of Riverhead*, 2 N. Y. 2d 500, 141 N. E. 2d 794; and note the distinction made by the Supreme Court of Texas in this case between the period before and that after March 17, 1950.

3. The only ground for complaint here by the United States (which, significantly, has not intervened here as it has in many other similar cases) would be that this tax, if sustained, would be an economic burden to the extent that it would diminish the rental value of its properties. Only to this extent, and only with reference to leases entered into hereafter, could the tax be a burden on the United States or its activities, since the lease here provides that the rent reserved will not be adjusted because of state or local taxation of the lessee's interest. (Tr. 111.) It is clear that a tax otherwise valid will not be deemed invalid because the economic incidence of it is upon the United States. *James v. Dravo Contracting Company*, 302 U. S. 134; *State*

of *Alabama v. King & Boozer*, 314 U. S. 1; *Esso Standard Oil Company v. Evans*, 345 U. S. 495.

C. A state tax law will not be deemed illegally discriminatory, or violative of the Equal Protection or Due Process clauses of the Constitution, where the tax classifications complained of are not arbitrary and unfair, but are based upon some reasonable differences between the classes established, and those differences need not be great or conspicuous in order to warrant classification. *Keeney v. Comptroller of the State of New York*, 222 U. S. 525; *Watson v. State Comptroller of the State of New York*, 254 U. S. 122; *Roberts & Schaefer Company v. Emmerson*, 271 U. S. 50. The discretion permitted to a State by the Federal Constitution in the laying of its taxes is very broad, and in classifying the subjects of taxation, if the ground of difference has a fair and substantial relation to the object of the legislation, under any state of facts that can reasonably be conceived, the tax will not be deemed violative of the Fourteenth Amendment. *Allied Stores of Ohio, Inc. v. Bowers*, U. S. , 79 S. Ct. 437.

Differences in classification, even when based upon minor differences, or governmental policy, are common in both statutory and case law:

(1) Compare the different federal tax treatment of state bank circulation (*Sections 4881-4883, 1954 Internal Revenue Code, 26 U. S. C. A. 4881-4883*) and national bank circulation (*Act of June 3, 1864, ch. 106, §41, 13 Stat. 111, 12 U. S. C. A. 541*).

(2) Only the real estate of Federal Reserve Banks is taxable (*Act of Dec. 23, 1913, ch. 6, §7, 38 Stat. 258, 12 U. S. C. A. 531*), but a much broader state tax is permitted on national banks generally (*Act of June 3, 1864, ch. 106, §41, 13 Stat. 111, 12 U. S. C. A. 548*). See also, with reference to other financial agencies of the United States, *12 U. S. C. A. 931, 1020f, 1261, 1433, 1464(h), 1723a(c), 1768, 1825*.

(3) While obligations of the United States had always been exempt from federal as well as state or local taxation, the federal exemption was removed by statute in 1941. *Act of Feb. 19, 1941, ch. 7, §4, 55 Stat. 9, 31 U. S. C. A. 742a*.

(4) A license tax on grain elevators located on railroad rights of way was held not illegally discriminatory, even though grain elevators not so located were not similarly taxed. *W. W. Cargill Company v. State of Minnesota, 180 U. S. 452*.

(5) A state income tax on individual income was not illegal, even though a corporation in the same circumstances was not taxed. *Lawrence v. State Tax Commission of State of Mississippi, 286 U. S. 276*.

(6) It is permissible to levy a tax on wholesale dealers in certain commodities without also taxing retail dealers, or dealers in different commodities. *Southwestern Oil Company v. State of Texas, 217 U. S. 114*.

The above are just a few of the many examples that could be given, but they should suffice to show that the

power to classify for taxation is so broad as to be virtually unlimited as a practical matter. Mr. Justice Frankfurter has referred to "the extremely limited restrictions that the Constitution places upon the States" in their power to lay taxes. *State of Wisconsin v. J. C. Penney Company*, 311 U. S. 435, 445; and see *Northwestern States Portland Cement Company v. State of Minnesota*, U. S. , 79 S. Ct. 357, 362.

(d) This Court has aptly stated that the test for determining whether a tax infringes constitutional limitations is based upon the operating incidence of the tax, and that a tax is valid if it bears a proper relation to the opportunities given, protection afforded, and benefits conferred by the state. *State of Wisconsin v. J. C. Penney Company*, 311 U. S. 435. This test is especially applicable in this case in determining the reasonableness of the classification established by the State of Texas. Appellant argues that it is classified as a lessee of Federal property, and that this class is arbitrary and unreasonable because it does not include lessees of state or municipal property. What Appellant would ignore here is the fact that the State of Texas does not own many millions of dollars worth of prime industrial plants that are required, by the demands of national security, to be maintained in a state of semi-readiness for arms production, and that can best be kept in such status by being leased to private industry. See *Senate Report No. 1409, 80th Congress, Second Session, 1948 U. S. Code Congressional Service 2290*. The existence of this "National Industrial Reserve," and the practice of

leasing the facilities to private concerns such as Appellant, thus creates a class of users and occupiers that differ from most industrial concerns only in the circumstance that their landlord pays no taxes on the leased premises. These lessees employ labor, their employees have children who attend local schools, and yet these lessees occupy properties which would not, except for statutes such as the Texas statute in question here, contribute to the cost and maintenance of these schools as other privately-owned properties do. As the Michigan Court said, with reference to its comparable statute: "Without Act 189 a lessee or user for profit of Federally-owned tax-immune realty becomes specially privileged and notably favored over his local classmates, and I refer to that class which directly shares the burdens as well as the benefits of local government." *Township of Muskegon v. Continental Motors Corporation*, 346 Mich. 218, 77 N. W. 2d 799, affirmed, 355 U. S. 484. When considered in this light, the reasonableness and simple justice of the classification adopted by the State of Texas, and permitted by the Congress, is clearly recognized.

III.

THE TAX IS A TAX UPON THE PROPERTY OF APPELLEE AND NOT UPON FEDERAL PROPERTY

Except to the extent that the Supreme Court of Texas may have based its decision on untenable state grounds to avoid a legitimate solution to the applicable federal questions, its decision is controlling on the question of the type

of tax imposed by the statute, and the incidence of that tax. Appellant, in its argument here, implies that the Texas Court had no tenable basis for its holding that the tax is levied upon property of Appellant, and asserts that the tax is in fact levied upon federal property, assessed to a bailee thereof.

A. It is elementary that a statute will not be so construed as to render it invalid if it can be reasonably construed otherwise. Since this statute would clearly be unconstitutional if it purported to levy a direct tax upon federal property, the Texas Court was authorized to find that the tax was not so intended, if the state law allowed any other reasonable construction. That the construction adopted is consonant with established principles of Texas law is demonstrated by the opinion of the Texas Court:

(1) Both the Constitution and statutes of the State provide for taxation of "all property" not specifically exempted.

(2) Many types of property rights less than fee simple ownership are taxable under Texas law. *State of Texas v. Wynne*, 134 Tex. 455, 133 S. W. 2d 951; *Hager v. Stakes*, 116 Tex. 453, 294 S. W. 835; *State of Texas v. Austin & N. W. R. Company*, 94 Tex. 530, 62 S. W. 1050; *Hydrocarbon Production Co., Inc. v. Valley Acres Water District*, 204 F. 2d 212 (5th Cir.); *Downman v. State of Texas*, 231 U. S. 353; Articles 7173, 7173a, *Vernon's Annotated Civil States*.

(3) Article 7146, *Vernon's Annotated Civil Statutes*, defines real property to include not only the land itself but

"all of the rights and privileges belonging or in anywise appertaining thereto," and the Texas Court held that a right of use and occupancy for profit is a valuable property right that is subject to taxation. This Court has approved such a definition as including leaseholds under the Washington statute, which is identical in terms to the Texas statute. *Trimble v. City of Seattle*, 231 U. S. 683; see *Moeller v. Gormley*, 44 Wash. 465, 87 Pac. 506.

B. This Court has approved taxation of lesser interests than the fee on many occasions. *City of Detroit v. The Murray Corporation of America*, 355 U. S. 489; *United States v. Township of Muskegon*, 355 U. S. 484; *Offutt Housing Company v. County of Sarpy*, 351 U. S. 253; *Trimble v. City of Seattle*, 231 U. S. 683; *Fort Dix Apartments Corporation v. Borough of Wrightstown*, 225 F. 2d 473 (3rd Cir.), cert. denied, 351 U. S. 962.

C. Nothing contained in the Texas statutes, or in the opinions or judgments of the Texas courts in this case, demonstrates an attempt to levy upon the United States or its property, to interfere with its operations or its treasury, or to do more than assess against Appellant, a private corporation, a tax for which it alone is liable. No lien is asserted or implied against the United States or its property. The failure of the statute to state specifically that no lien is provided does not invalidate the statute, since the non-existence of the lien is self-evident.

D. *United States v. Allegheny County*, 322 U. S. 174, is not at all in point here. Although the value of the fed-

eral property was used as a measure of the tax on Appellant's right of use and occupancy, as it was in the Michigan cases, *supra*, the tax was not levied on the federal property itself, as it was in *Allegheny County*. It is clear that *Allegheny County* does not prohibit an ad valorem tax as such, just because a federal property is involved, but that what is held improper is an attempt to tax the property itself by making the levy against a bailee. This Court there specifically reserved decision on the question of taxation of the "right of possession and use," and the propriety of such taxation was later affirmed in the Michigan cases.

CONCLUSION

For the foregoing reasons, Appellee respectfully submits that the Appellant presents no substantial federal questions for the decision of this Court, and that the appeal should be dismissed.

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APR 13 1959

JAMES H. B. ... Clerk

In the
Supreme Court of the United States
OCTOBER TERM, 1958

No. ~~303~~ 40

PHILLIPS CHEMICAL COMPANY, a Corporation,
Appellant,
v.

DUMAS INDEPENDENT SCHOOL DISTRICT,
Appellee.

On Appeal From the Supreme Court of the State of Texas

**BRIEF OF APPELLEE DUMAS INDEPENDENT
SCHOOL DISTRICT IN SUPPORT OF ITS
MOTION TO DISMISS**

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April 13, 1959

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In the
Supreme Court of the United States
OCTOBER TERM, 1958

No. 769

PHILLIPS CHEMICAL COMPANY, a Corporation,
Appellant,
v.

DUMAS INDEPENDENT SCHOOL DISTRICT,
Appellee.

On Appeal From the Supreme Court of the State of Texas

**BRIEF OF APPELLEE DUMAS INDEPENDENT
SCHOOL DISTRICT IN SUPPORT OF ITS
MOTION TO DISMISS**

Appellee, Dumas Independent School District, pursuant to Rule 35(1) of the Revised Rules of this Court, files this brief of additional authorities in support of its motion to dismiss the appeal in this case.

I.

**THE CLASSIFICATION FOR TAX PURPOSES MADE
BY THE STATUTE IN QUESTION IN THIS
CASE IS NOT UNCONSTITUTIONAL**

It is axiomatic that all taxation involves classification. Virtually every case decided by this or any other court on the question of validity of a tax recognizes this fact, either expressly or by implication. Every imaginable type of tax is created and applied with reference to certain classes of people and things. In the income tax law, for example, one who earns less than \$600.00 per year pays no tax, and one who earns \$100,000.00 per year pays considerably more tax than one who earns only \$10,000.00 per year; up to the age of 64 years, an individual has only one personal exemption, but at age 65 he is granted an additional exemption; profit made on the sales of certain types of capital assets made within 6 months of acquisition are taxed in one way, while profits made on sales more than 6 months after acquisition are taxed in another way. The tariff laws consist mostly of classifications of different types of imported products, some of which are not taxed at all, and those which are taxed being taxed at many varying rates, determined upon considerations both economic, social, political, and diplomatic. Cigars and cigarettes are not taxed at the same rate. Different types and strengths of alcoholic beverages are taxed differently. Certain items such as furs and jewelry are considered luxuries, and a special tax is imposed on the sale thereof. Taxes and surtaxes, exceptions, deductions and exemptions,

the list could go on and on. The Internal Revenue Code alone demonstrates the massive complexity of classification, in the scheme of taxation, in order that the necessary revenues may be obtained to support our national, state and local governments. In this setting, the Appellant in this case argues that the tax laid on it by the State of Texas is based upon a classification so unreasonable and arbitrary as to deny to Appellant the equal protection of the laws and to deprive it of its property without due process of law, in violation of the Constitution of the United States. Appellee believes that the many cases decided by this Court approving classification for taxation in the various ways hereafter set forth demonstrate that Appellant's position is untenable, and that no substantial federal question is presented by this appeal.

One of the leading cases on the question of discrimination in State taxation and the limits imposed by the Fourteenth Amendment is the *Bell's Gap Railroad Company v. Pennsylvania*, 134 U. S. 232. The Court said that the Constitution does not prevent a State from adjusting its system of taxation in all proper and reasonable ways, and that an iron rule of equal taxation is not required. The Constitution is not intended to "render nugatory those discriminations which the best interests of society require, which are necessary for the encouragement of needed and useful industries, and the discouragement of intemperance or vice, and which every state, in one form or another deems it expedient to adopt." All that is forbidden is the adoption of "clear and hostile discriminations against

particular persons and classes." The tax there upheld was levied against moneyed securities, which was computed upon the nominal or par value of all bonds and other securities issued by corporations, but upon the actual dollar value of all other securities.

One of the keenest analyses of the question of classification for taxation to be found is that of Mr. Justice McKenna in *Heisler v. Thomas Colliery Company*, 260 U. S. 245. The problem there was a tax on coal. It appears that there are two types of commonly used coal, anthracite and bituminous, and the State of Pennsylvania had classified them differently for tax purposes. Opponents of the tax laid upon anthracite coal only, contended that since both types of coal were fuels, they must necessarily be associated in the same class for taxation. The Court characterized this argument as being based upon a comparison of their similarities only, while ignoring the many differences between these two types of coal. The Court points out that in erecting classes, it is necessary not only to consider the properties of the things to be classified, but also to consider the purposes in view in erecting the classes. A plant may be classified one way by a farmer and another way by a botanist, and yet both classifications may be perfectly logical. It seems that the question then becomes one of determining not whether two things could logically be classed together, but whether, under any permissible purpose, they can be placed in different classes. The Court then points out the broad limits of permissible purposes for which objects can be classified for taxation,

recognizing that any fact which can be reasonably conceived of as having existed when the law was enacted will be assumed in order to justify the classification adopted. Thus, a court should not look for the similarities between objects differently classified, but should look for differences between them in order to see if any reasonable set of facts can be conceived of which will justify their having been classified differently.

The reasoning of the *Heisler* case is easily applied to the situation presented in the present case. Appellant would have the decision in this case turn upon the question of discrimination between classes, but Appellant would further define these classes itself, according to its own restricted definition. It would look to *Article 5248, Vernon's Annotated Civil Statutes* only, and it would find there a class of lessees of federally-owned property, and it would say that this class of persons is singled out for hostile and discriminatory tax treatment. In one class, it would say, are those persons who lease property from the federal government, and in another class are all those persons who lease any type of property, other than federal property, that would be exempt from taxation in the hands of the owner exclusively. Appellant would then argue that such classification is arbitrary, because all members of both classes lease property from tax-exempt owners. This is the similarity, but where are the differences?

In the first place, although the federal government may not be liable for taxes on its property (except by its own choice, and an express waiver of immunity), many of the

owners in the other class lose their exemption if the property is used with a view to profit, or if not used exclusively for the tax-exempt purpose. Thus, we must strike out some members of the second class, because of this essential difference, and there remains in the second class only public property owned by the State and its instrumentalities. Then, some of this public property must be stricken from the class, because the State of Texas has chosen to waive its own immunity in certain cases. For example, property of the State leased for a term of three years or more is subject to taxation. *Article 7173, Vernon's Annotated Civil Statutes*. County School lands are subject to taxation. *Article 7150a, Vernon's Annotated Civil Statutes*. University of Texas lands are subject to taxation. *Article 7150c, Vernon's Annotated Civil Statutes*. As we eliminate members of the second class, the creation of the first class becomes demonstrably less "arbitrary", since only by the erection of such a class could the members thereof be made to bear their fair share of the burdens being met by the properties that have been excluded from the second class.

Finally, however, we may arrive at a point where no more members of the second class can be eliminated, and there will still be properties exempt from taxation, with no statutory provision for taxation of the users or occupiers thereof. But even here, the legislature may not be deemed to have done an arbitrary or unreasonable thing when it protects itself and its creatures from taxation without at the same time protecting the creatures of another sover-

eign. A State is entitled to foster its local interests and insure its revenues. *Ohio Oil Company v. Conway*, 281 U. S. 116, 159. Reasonable discrimination between classes to promote fair competitive conditions and to equalize economic advantages is lawful. *Great Atlantic & Pacific Tea Company v. Grosjean*, 301 U. S. 112. A taxing act is not invalid because its exemptions are more generous than the State would have been free to make them by exerting the full measure of her power. *Hennickford v. Silas Mason Company, Inc.*, 300 U. S. 577.

Even, however, should it be considered that there is no reasonable basis for placing lessees of federal property in one class and lessees of state and local property in another class, for any of the above reasons, it should be a sufficient basis for the distinction to show that only the federal government is the owner of large industrial plants available for lease to private businesses.

All of the above argument, however, is based upon the proposition that the Appellant here has erected the proper classes, and this is not necessarily true. Under the circumstances of this present case, it seems more logical to erect two classes of users and occupiers of industrial plants, one class to contain those businesses which own their own plants or lease them from private owners, and the other class to contain those who lease their plants from the federal government, under the National Industrial Reserve program. In the first class, the user or occupier either pays taxes himself on his plant, or his landlord pays taxes on the plant and passes along the cost thereof in the way of

increased rent. *United States and Borg-Warner Corporation v. City of Detroit*, 355 U. S. 466. The members of this class bear their share of the cost of government benefits, such as schools, roads, hospitals, police, and fire protection, and many others. The members of the second class, except for statutes such as the one under consideration in this case, do not pay their share of such costs. Thus, they receive certain benefits for which they do not pay, and in addition they are placed in a position of economic advantage over the members of the first class. Either of these situations should be sufficient basis for a difference in classification for tax purposes. *Township of Muskegon v. Continental Motors Corporation*, 346 Mich. 218, 77 N. W. 2d 799, affirmed, 355 U. S. 484.

Appellee believes that none of the above assumptions are idly made, but that all of them have a very real relation to the problem at hand. Appellee believes that this is the sense of the opinion in *Heisler v. Thomas Colliery Company*, 260 U. S. 245; and see the dissenting opinion of Mr. Justice Frankfurter in *Morey v. Doud*, 354 U. S. 457, 472.

The matter of propriety of classifications here becomes even more clear when viewed in the light of *Oliver Iron Mining Company v. Lord*, 260 U. S. 245. The tax in that case was upon the business of mining iron ore, and the tax was based upon the amount of ore mined, less the amount of royalties paid by the operators and tax payers. It was complained that inequality would result from the fact that some mine operators were lessees and paid

royalties, while others were owners of the mines and paid no royalties. The Court pointed out that under the record in the case, there were only six mines in the state operated by the owners, and that none of these mines had been operated during the year in question, so that no discrimination in fact resulted, and the question was not subject to being raised. Thus, in the present case, there is no showing that any lessee in an industrial plant in the State of Texas is in any more favored position than the Appellant here, as there is no showing that any industrial plant in this state is leased to a private business for profit without either the lessee or the lessor paying taxes thereon.

An important consideration in measuring the power of a state to tax, within the framework of the Federal Constitution, is the matter of the extent of state sovereignty and control over the subject of taxation. In other words, the incidence of the tax will be measured against the benefits, protections, and privileges granted by the taxing authority. *State of Wisconsin v. J. C. Penney Company*, 311 U. S. 435. The basic principle that the power to tax is an incident of sovereignty, and is co-extensive with that sovereignty, and includes all subjects over which the sovereign power of a state extends, is as old as the question of the constitutional limits on state taxing power. *McCulloch v. The State of Maryland*, 4 Wheat 316, 429. While this case is most often cited for the proposition that a state cannot tax the instrumentalities of the national government, yet it must always be remembered that this case

also held that there is no constitutional prohibition against the states' taxation of the real property of a national bank, in common with other real property within the state, nor to taxing the interest that citizens of the state may hold in the national banking institutions. When the operations of Appellant in this case are considered as being within the control of the State of Texas, just as are the operations of any other manufacturing concern, then it should be seen that the sovereignty of the state extends to the right to tax these operations. *International Harvester Company v. Wisconsin Department of Taxation*, 322 U. S. 435.

The question of collateral political and economic motives underlying a tax classification statute was the principal emphasis in *A. Magnano Company v. Hamilton*, 292 U. S. 70. The State of Washington had levied an excise tax of 15c per pound on butter substitutes, and it was argued that this tax constituted an arbitrary and illegal discrimination against such products, and that the tax was not levied for a public purpose but for the sole purpose of burdening or prohibiting the manufacture and sale of oleomargarine, in aid of the dairy industry. The Court held that except in rare and special instances, the due process of law clause is not a limitation upon the taxing power of the states; and that a tax is prohibited by such clause only if it is so arbitrary as to compel the conclusion that it does not involve an exertion of the taxing power, but constitutes, in substance and effort, the direct exertion of a different and forbidden power. The Court further held that the collateral purposes or motives of a legislature in levying

a tax of a kind within the reach of its lawful power are matters beyond the scope of judicial inquiry, and that a tax within such lawful power may not be stricken down by the courts merely because its enforcement may or will result in restricting or even destroying particular occupations or businesses. The tax will not be stricken down unless its necessary interpretation and effect be such as plainly to demonstrate that the form of taxation was adopted as a mere disguise, under which there was exercised, in reality, another and different power denied by the Federal Constitution to the state.

A penetrating analysis of the question of legislative power to tax is found in the opinion of Mr. Justice Cardozo, in *Burnet v. Wells*, 289 U. S. 670, with particular reference to the paragraph beginning near the end of page 677. The Court there quoted from the opinion of Mr. Justice Holmes in *Corliss v. Bowers*, 281 U. S. 376, 378: "Taxation is not so much concerned with the refinements of title as it is with actual command over the property taxed—the actual benefit for which the tax is paid." The Court states that in order to be liable for a tax, the taxpayer does not have to enjoy all of the privileges and benefits by the most favored owner at a given time or place, that the Government is not confined by the traditional classification of interests or estates, and that it may tax not only ownership, but any right or privilege that is a constituent of ownership. In determining whether or not a legislature has levied an arbitrary tax, some margin is allowed for the play of legislative judgment, and a tax will not be

deemed arbitrary and unconstitutional unless the burden laid is unrelated to privilege or benefit.

It is settled that a tax may be levied upon less than the full ownership of property. *Burnet v. Wells*, 289 U. S. 670. Thus, the gift tax provisions of the Internal Revenue Code have been sustained upon the theory that a tax may be levied upon a particular use of property or the exercise of a single power over property incidental to ownership. *Bromley v. McCaughn*, 280 U. S. 124. So, also, gasoline used in interstate commerce, and thus exempt from a direct tax, may be subjected to taxation upon the privilege of storing the same within a state. *Nashville, C. & St. L. Ry. v. Wallace*, 288 U. S. 249. The guiding principle laid down in *Burnet v. Wells*, *supra*, has been recently restated by this Court in *International Harvester Credit Corporation v. Goodrich*, 350 U. S. 537, 547.

For other cases, representative of the many cases which have held classification to be constitutional, under varying circumstances, and which cases offer guidance in determining the constitutional issues involved here, see the following: *The Home Insurance Company of New York v. New York*, 134 U. S. 594; *McHenry v. Alford*, 168 U. S. 651; *Maxwell v. Bugbee*, 250 U. S. 525; *Dane v. Jackson*, 256 U. S. 589; *Carmichael v. Southern Coal & Coke Company*, 301 U. S. 495; *Great Atlantic & Pacific Tea Company v. Grosjean*, 301 U. S. 412; *Henneford v. Silas Mason Company, Inc.*, 300 U. S. 577; *New York Rapid Transit Corporation v. City of New York*, 33 U. S. 573, and *Walters v. City of St. Louis, Missouri*, 347 U. S. 231.

II.

THE IMMUNITY OF THE UNITED STATES SHOULD NOT BE HELD TO EXTEND TO ITS LESSEE

Formerly, the principle of immunity stated in *McCulloch v. The State of Maryland*, 4 Wheat 316, based upon the proposition that the power to tax is the power to destroy, was carried to great lengths. Thus, the federal government could not tax the emoluments of a state office, *Collector v. Day*, 11 Wall. 113, and a state could not tax a federal officer, *Dobbins v. Erie County*, 16 Pet. 435. The whittling away of this immunity of private individuals, based upon their relationship to the sovereign, is traced and discussed in some detail by Professor Powell in his article, "The Waning of Intergovernmental Tax Immunities," 58 *Harvard Law Review* 633. In 1937, this Court finally approved the federal income taxation of the salaries of employees of state agencies, *Helvering v. Gerhardt*, 304 U. S. 405, and shortly thereafter allowed state income taxation of the salaries of federal officials, *Graves v. New York Ex Rel. O'Keefe*, 306 U. S. 466.

This trend toward withdrawing the sovereign immunity from those with whom the government deals has continued apace. See *State of Alabama v. King & Boozer*, 314 U. S. 1; *James v. Dravo Contracting Company*, 302 U. S. 134; *Silas Mason Company, Inc. v. Tax Commission of State of Washington*, 302 U. S. 186; and *Curry v. United States*, 314 U. S. 14. A thorough review of the decisions over the preceding ten or twelve years is found in *Oklahoma Tax*

Commission v. Texas Company, 366 U. S. 342, which case overruled prior decisions of the Court and held that a lessee for oil and gas of exempt Indian lands was not exempt from taxation on its interest as lessee, with reference to the state gross production tax. The philosophy of *Oklahoma Tax Commission v. Texas Company* seems clearly to have received the continuing approval of this Court to the present time. The appeal in this case asks the Court to reverse this trend, and to accord to Appellant, a private corporation, an immunity from taxation upon the ground that it is a lessee of the United States. Appellee submits that this should not be done.

An important case along the road to the recent decisions was *Helvering v. Mountain Producers Corporation*, 303 U. S. 376, which refused the protection of governmental immunity to income derived from a state oil and gas lease. While that case dealt with federal taxation of state instrumentalities, the Court did not limit its holding in that regard, and the language of the opinion is broad enough to cover taxation of any government-related private right. See *United States and Borg-Warner Corporation v. City of Detroit*, 355 U. S. 466.

The immunity of the government has been held not to extend to those interested with it in a property, in several different circumstances. Thus, the right to appropriate water from a government lake is taxable. *Northside Canal Company, Ltd. v. State Board of Equalization*, 8 F. 2d 739 (D. Wyo.), reversed on other grounds, 17 F. 2d 55 (8th

Cir.), *Cert. denied*, 274 U. S. 740. Mining claims, consisting of the right to go upon government land for the purpose of prospecting and exploring for minerals, when legal title to the land is in the federal government, have been held taxable. *Forbes v. Gracey*, 94 U. S. 762; *Elder v. Wood*, 208 U. S. 226; and *Ickes v. Ginia-Colorado Development Corporation*, 295 U. S. 639. State taxation of a property has been upheld even where the legal title is still in the United States, under a contract of sale. *S. R. A. v. State of Minnesota*, 327 U. S. 558. The problem of "exclusive jurisdiction" is not present in this case (Tr. 68-69), so that there is no lack of power to levy state taxes. See *Surplus Trading Company v. Cook*, 281 U. S. 647.

The act of Congress which is relied upon by Appellee here as a waiver of any express or implied governmental immunity, *Act of August 5, 1947, ch. 493, 61 Stat. 774*, has been held many times to allow the application of any proper and valid state law levying a tax upon the interest of the lessee in federal property. This Court has expressly approved such taxation. *Offutt Housing Company v. County of Sarpy*, 351 U. S. 253; and *Fort Dix Apartments Corporation v. Borough of Wrightstown*, 351 U. S. 962, *d denying certiorari*, 225 F. 2d 473 (3rd Cir.). Such taxation has been upheld by numerous state courts. *Kirtland Heights, Inc. v. Board of County Commissioners of Bernalillo County*, 64 N. M. 179, 326 P. 2d 672; *Bragg Investment Company, Inc. v. Cumberland County*, 245 N. C. 492, 96 S. E. 2d 341; *Conley Housing Corporation v.*

Coleman, 211 Ga. 835, 89 S. E. 2d 482; *Meade Heights, Inc. v. State Tax Commission*, 202 Md. 20, 95 A. 2d 280; *State of Missouri v. Personnel Housing, I. c.*, Mo. 300 S. W. 2d 506; *Gay v. Jemison*, Fla. , 52 So. 2d 137. The only cases which have refused to uphold the state tax have been cases where, under applicable state laws, the interest of the lessee was not deemed subject to any state tax. *Grumman Aircraft Engineering Corporation v. Board of Assessors of the Town of Riverhead*, 2 N. Y. 2d 500, 141 N. E. 2d 794; *Squantum Gardens v. Assessor of Quincy*, Mass. , 140 N. E. 2d 482.

The most recent decisions of this Court have upheld state taxation of private interests, even when very closely associated with exempt interests of the United States. *City of Detroit v. The Murray Corporation of America*, 355 U. S. 489; *United States v. Township of Muskegon*, 355 U. S. 484; and *United States and Borg-Warner Corporation v. City of Detroit*, 355 U. S. 466.

The above authorities clearly reflect two things: (1) A lessee of federal property may have such a private interest in the property as will support taxation; and (2) the fact that the federal government owns the fee title to property does not exempt a lessee from paying taxes on its private possessory interest in the property. Thus, in this case, where the tax is levied against the private ownership right of use and possession of the property, the tax is valid even though the fee simple title to the property is owned by the United States.

CONCLUSION

Appellee respectfully submits that its motion to dismiss should be granted, on the grounds that no substantial federal question is presented by the appeal.

Respectfully submitted,

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April 13, 1959

APR 1958
JAMES R. GILKINSON
No. ~~100~~ 40

In the Supreme Court of the United States

OCTOBER TERM, 1958

PHILLIPS CHEMICAL COMPANY, APPELLANT

v.

DUMAS INDEPENDENT SCHOOL DISTRICT

**ON APPEAL FROM THE SUPREME COURT OF THE STATE OF
TEXAS**

**MEMORANDUM OF THE UNITED STATES AS AMICUS CURIAE
IN OPPOSITION TO MOTION TO DISMISS**

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 769

PHILLIPS CHEMICAL COMPANY, APPELLANT

DUMAS INDEPENDENT SCHOOL DISTRICT

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF
TEXAS

MEMORANDUM OF THE UNITED STATES AS AMICUS CURIAE IN OPPOSITION TO MOTION TO DISMISS

The United States believes that this case presents an important question of constitutional law involving federal-state inter-governmental tax immunity, resolved by the court below contrary to the principles enunciated by this Court last Term in *United States v. City of Detroit*, 355 U.S. 466. It therefore urges that the motion to dismiss should be denied, and that this Court should note probable jurisdiction.

1. In the *City of Detroit* case, *supra*, this Court, in sustaining the constitutionality of a Michigan tax upon tax-exempt real property used by private persons for profit, as applied to real property leased by

a private company from the United States, recognized that a state tax may be invalid "if it operates so as to discriminate against the Government or those with whom it deals" (355 U.S. at 473). It held, however, that the state tax there involved did not on its face discriminate against federal lessees, since it "applies to every private party who uses exempt property in Michigan in connection with a business conducted for private gain" (*Ibid.*). "Nor is there any showing that the tax is in fact administered to discriminate against those using federal property. To the contrary undisputed evidence introduced by appellees demonstrates that lessees of other exempt property have also been taxed" (*Id.* at 474). See, also, *City of Detroit v. Murray Corp.*, 355 U.S. 489, 494.

In the instant case, however, the Texas law "is in fact administered to discriminate against those using federal property." For, with respect to non-federal lessees, the tax is imposed only on leases of more than three years' duration (which, under Texas law, do not include leases of that length which are unilaterally terminable on short notice), and is measured by the value of the leasehold, not of the entire fee. But appellant, as a lessee of the Federal Government, is taxed even though the lease is unilaterally terminable by the United States on 30 or 90 days' notice, and the tax is measured not by the value of the leasehold, but by the entire fee. This tax, therefore, is significantly different from the non-discriminatory Michigan taxes which the Court upheld last Term. We submit that the Supreme Court of Texas erred in sustaining its validity.

2. The question whether state and local governments may impose discriminatory taxes upon property which has been leased by the United States to private operators is a matter of continuing and substantial importance to the United States. The decision below sustains a state law which taxes lessees of the Federal Government more onerously than other lessees having the same property interests. Although the particular lease here involved does not require the United States to reimburse the lessee for the tax, the contrary situation exists with respect to other leases which are similarly subject to the same Texas tax. Furthermore, the decision below, if allowed to stand, inevitably would cause a significant reduction in the rental value of government property which is subject to such local taxation, as compared to other rental property. It sanctions the imposition of a greater tax burden upon "those with whom it [the Government] deals" (*City of Detroit* case, *supra*) than upon those whose leasehold interests are acquired from non-federal sources. A state, however, cannot impose a tax which "operates so as to discriminate against the Government or those with whom it deals" (*ibid.*).

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted,

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APRIL 1959.

FILED

SEP 15 1959

JAMES R. BROWNING, Clerk

IN FILE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 40

PHILLIPS CHEMICAL COMPANY, A Corporation,
Appellant,

v.

DUMAS INDEPENDENT SCHOOL DISTRICT

On Appeal From the Supreme Court of the
State of Texas

BRIEF FOR APPELLANT

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IN THE
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OCTOBER TERM, 1959

No. 40

PHILLIPS CHEMICAL COMPANY, A Corporation,
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v.

DUMAS INDEPENDENT SCHOOL DISTRICT

On Appeal From the Supreme Court of the
State of Texas

BRIEF FOR APPELLANT

OPINIONS BELOW

The majority and dissenting opinions of the Supreme Court of Texas (R. 177-203) are reported at 316 S.W. 2d 382. The opinions of the Court of Civil Appeals for the Seventh Supreme Judicial District, sitting at Amarillo, Texas (R. 165-170, 172-174), are

reported 307 S.W. 2d 605. The District Court rendered no opinion; its judgment is set out at R. 38-48.

JURISDICTION

The judgment of the Supreme Court of the State of Texas was entered on June 18, 1958 (R. 203-204). Appellant's timely Motion for Rehearing was overruled on October 22, 1958 (R. 205). The Notice of Appeal was filed on January 15, 1959, and the Jurisdictional Statement was filed on March 13, 1959. This Court noted probable jurisdiction on May 18, 1959 (R. 211). 359 U.S. 987 The jurisdiction of this Court to review the decision below by direct appeal is conferred by 28 U.S.C. 1257(2).

STATUTE INVOLVED

Chapter 37 of the Texas Session Laws, 1950, Fifty-First Legislature, First Called Session:

"An Act to amend Article 5248, Revised Civil Statutes of Texas, 1925, relative to the exemption of lands and improvements owned by the United States of America from taxation, so as to provide that all personal property located on said lands owned by private parties and all parts of said lands and improvements used and occupied by private parties shall be subject to taxation; providing a saving clause; repealing all laws and parts of laws in conflict; and declaring an emergency.

"Be it enacted by the Legislature of the State of Texas:

"Section 1. That Article 5248 of the Revised Civil Statutes of Texas, 1925, is hereby amended so as to hereafter read as follows:

“Article 5248.

“The United States shall be secure in their possession and enjoyment of all lands acquired under the provisions of this title; and such lands and all improvements thereon shall be exempt from any taxation under the authority of this State so long as the same are held, owned, used and occupied by the United States for the purposes expressed in this title and not otherwise; provided, however, that any personal property located on said land which is privately owned by any person, firm, association of persons or corporation shall be subject to taxation by this State and its political subdivisions; and provided, further, that any portion of said lands and improvements which is used and occupied by any person, firm, association of persons or corporation in its private capacity, or which is being used or occupied in the conduct of any private business or enterprise, shall be subject to taxation by this State and its political subdivisions.”

“Sec. 2. In the event that any section, subsection, paragraph, sentence, clause, phrase or wording of this Act shall be held invalid or inoperative, such holding shall not affect the validity of the remaining portions of this Act, and the Legislature hereby declares that it would have enacted such remaining portions despite such invalidity.

“Sec. 3. All laws and parts of laws in conflict herewith are hereby repealed to the extent of such conflict.

“Sec. 4. The fact that there is no adequate provision in the Statutes of this State providing for taxation of personal property located on lands belonging to the United States which are privately owned by persons, firms, associations of persons and corporations, and lands and improvements, although owned by the United States of America, which are used and occupied in the conduct of pri-

vate businesses and enterprises by persons, firms, associations of persons and corporations, and the further fact that the funds being lost by reason of these properties escaping taxation are badly needed by the State and its political subdivisions create an emergency and an imperative public necessity that the Constitutional Rule requiring bills to be read on three several days in each House be suspended, and said Rule is hereby suspended, and this Act shall take effect and be in force from and after its passage, and it is so enacted."

QUESTIONS PRESENTED

Under the Constitution of Texas, school districts, such as Appellee Dumas Independent School District, are authorized to assess only ad valorem taxes, which become a lien upon the property.

The Supreme Court of Texas in this case has construed Chapter 37 of the Texas Session Laws, 1950, Fifty-First Legislature, First Called Session, as authorizing Appellee to assess against Appellant Phillips Chemical Company, a tax measured by the full fee value of the Federally-owned Cactus Ordnance Works leased to Phillips. The maximum tax assessable against lessees of non-Federal tax-exempt property is limited under Texas law to the value of the leasehold. Furthermore, under the Texas law no tax is imposed upon a lessee of non-Federal tax-exempt property where his lease is for less than three years. Under the decision below it may be that no tax at all is assessable against a lessee of non-Federal tax-exempt property regardless of the duration of his lease. The questions presented are:

1. Whether Chapter 37 is, as here applied, repugnant to the Constitution of the United States and in-

valid because it discriminates against the United States and those with whom it deals, imposes an unconstitutional burden on the activities of the Federal Government and infringes upon its sovereignty.

2. Whether Chapter 37 is repugnant to the Constitution of the United States and invalid as violative of the Due Process and Equal Protection Clauses of the Fourteenth Amendment because it constitutes discriminatory and arbitrary class legislation against lessees of Federal property.

3. Whether Chapter 37 is repugnant to the Constitution of the United States and invalid because it taxes to Phillips certain property, which is owned, not by Phillips, but by the United States and on which the State, since Congress has not assented thereto, may not assess taxes.

STATEMENT

During World War II the United States constructed in Moore County, Texas, a plant known as Cactus Ordnance Works. The Secretary of the Army, acting under the authority of the Act of August 5, 1947, C. 493, 61 Stat. 774, leased this plant to Phillips Petroleum Company effective August 16, 1948 (R. 52-78). The lease was later assigned to Appellant, Phillips Chemical Company (Phillips) with the Government's consent (R. 86-88).

The lease, which provided for an annual rental of approximately one million dollars and imposed other substantial obligations upon the lessee, was for a primary term of fifteen years (R. 52). However, the Government could terminate the lease unilaterally (a) upon thirty days' notice if the President or Congress

declared a national emergency (R. 72), and (b) upon ninety days' notice if the Government desired to sell the property (R. 72). Phillips has, at all times relevant hereto, occupied the property and used it to manufacture ammonia for use in commercial fertilizers. The United States is, and has been at all times, the sole owner in fee simple of the Ordnance Works.

In 1954, Appellee Dumas Independent School District, a political subdivision of the State of Texas, undertook to tax the Ordnance Works to Phillips for the years 1949 to 1954, inclusive. In accordance with usual ad valorem tax procedures, the local assessor assessed and placed the Ordnance Works upon the tax rolls in the name of Phillips Chemical Company as the owner of the property and the School District sought to collect from Phillips the taxes thus assessed (R. 92-102 [assessment forms]; 114, 117-119 [tax rolls]; 160-163 [tax statements]).

Phillips commenced a proceeding in the District Court of Moore County for a permanent injunction against the assessment and collection of such taxes and to have canceled the assessments on the tax rolls of the School District. Phillips alleged that there was no valid law or statute authorizing the imposition of these taxes; that the property was owned by the United States and was exempt from taxation; and that such taxation would take Phillips' property without due process of law and deny to Phillips the equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States. (R. 2-11)

After trial, the District Court denied the relief sought by Phillips for the period commencing March

17, 1950, the effective date of the statute here involved, Texas Session Laws, 1950, Chapter 37 (supra pp. 2-4) (R. 38-48).¹ The judgment of the trial court recited that beginning on March 17, 1950 for the tax year 1950, and for the subsequent tax years the Ordinance Works was subject to taxation by the School District and that Phillips had been legally assessed for such property because it had used and occupied it in its private capacity for profit as a business enterprise (R. 47-48).

The Court of Civil Appeals affirmed (R. 165-170)² as did the Supreme Court of Texas on writ of error. The Texas Supreme Court held that the 1950 Texas statute subjected Phillips to taxation for the full fee value of the Government-owned Ordinance Works and, as so construed, the statute was valid under the Constitution of the United States, as well as under the Constitution of Texas (R. 177-190). Three Justices dissented on the ground that under this construction the statute unconstitutionally discriminated against the United States and its lessees (R. 191-203). On Phillips' Motion for Rehearing (R. 204), an additional Justice joined in dissent (R. 194). The final decision of the Texas Supreme Court, therefore, sustained the validity of the statute by a narrow five to four vote.

¹ The court granted the relief with respect to the period prior to March 17, 1950, holding that neither the fee nor the leasehold interest was taxable to Phillips before such date (R. 38-47). There is no question here as to the validity of that action.

² Although it affirmed, the Court of Civil Appeals held that Phillips was subject to taxation only upon the value of its leasehold estate and that it was the leasehold estate which had been taxed by the School District.

SUMMARY OF ARGUMENT

I.

A. The unconstitutional discrimination inherent in Chapter 37 of the 1950 Texas Session Laws stems in the first instance from the fact that it is directed solely against lessees of Federal property. This is clear on the face of the statute and is expressly recognized by the School District. Since Federal lessees are thus the "obvious aim" of the 1950 statute, Chapter 37 constitutes special legislation against the Federal Government. For that reason without more it is unconstitutional. See *Miller v. Milwaukee*, 272 U.S. 713, 714-715.

B. The Michigan tax structure involved in the Michigan cases decided in the 1957 Term differs in critical respects from that of Texas. As a result, far from supporting the holding below, the established principles reaffirmed in these cases by this Court require a holding here that the Texas tax unconstitutionally discriminates against Federal lessees. The Michigan statute involved in *Borg-Warner*, by its terms and as administered, taxed equally every person using exempt property for private profit.

The Texas statute, however, segregates Federal lessees from lessees of other exempt property and requires them alone to pay a tax on the full fee value of the leased property. In contrast Texas does not impose any tax upon a lessee of other exempt property where his lease is for less than three years. Article

³ *United States v. City of Detroit*, 355 U.S. 466 (*Borg-Warner*); *United States v. Township of Muskegon*, 355 U.S. 484 (*Continental Motors*); *City of Detroit v. Murray Corp.*, 355 U.S. 489.

7173.⁴ Since this also includes leases for longer stated periods which may be terminated unilaterally by the lessor in order to sell the property, and since the United States in Phillips' lease had reserved such a right, no tax would be assessable against Phillips if its lessor were an exempt owner other than the United States. *Trammell v. Faught*, 74 Tex. 557. And even if Phillips' lease were not so terminable, Phillips still would be discriminated against since lessees of non-Federal exempt property for terms of three years or more are taxable solely on the value of their leasehold interests and not on the entire fee. Article 7174;⁵ e.g., *Daugherty v. Thompson*, 71 Tex. 192.

C. 1. The fact that the States have generally been accorded wide powers of classification in administering their tax systems is irrelevant here. In none of the cases recognizing this power was there any occasion to balance the States' need for revenues against the equally essential need of the Federal Government for freedom in the discharge of its functions. On the other hand, the maximum State tax sanctioned by this Court upon persons dealing with the Federal Government has been that which bears equally upon others similarly situated because such even-handed taxation accords appropriate weight to the respective State and Federal interests.

2. Even if it were permissible to classify Federal lessees separately there is no reasonable basis here for such classification, particularly in light of Chapter 37's limited purpose of raising revenues. The substantial value of the Government's plant here involved does

⁴ Vernon's Annotated Texas Civil Statutes.

⁵ Vernon's Annotated Texas Civil Statutes.

not justify such classification. Chapter 37 extends to all Federally-owned property in Texas, large or small, valuable or not, which is leased to private enterprise.

The fact that the children of the lessee's employees attend local schools also is immaterial. Employees of lessees of other exempt property similarly have children attending local schools, yet their landlords neither make voluntary financial contributions for schools, as does the United States, nor are they or their lessees required to pay a tax comparable to that imposed by Chapter 37. At most, this purported justification would support the assessment of taxes equally upon all lessees of exempt property.

Nor is the classification supportable as a proper effort to foster local interests. Such fostering is inappropriate when, as here, it "trench[es] upon the prerogatives of the national government." *Ohio Oil Co. v. Conway*, 281 U.S. 146, 159. The States' natural tendency to favor local interests might very well obstruct the requisite freedom of the Federal Government to discharge its functions.

D. The Act of August 5, 1947, C. 493, 61 Stat. 774, under which the present lease was executed does not authorize heavier tax burdens upon Federal lessees. Section 6 of that Act and its legislative history show concern only with the alleviation of local financial problems and minimization of the economic advantages which in some cases accrued to Federal lessees. It is clear from the Hearings that Congress did not intend to sanction more onerous state taxes upon Federal lessees than those imposed upon others. This reading accords as well with the various Federal and State cases applying Section 6.

II.

A. Chapter 37 is also unconstitutional for the further reason that it imposes an ad valorem tax upon Federal property. As in *United States v. Allegheny County*, 322 U.S. 174, the tax imposed by Chapter 37 is directly upon the Government property. Not only does Chapter 37 so impose the tax by its terms, but also by failing to specify who should pay the tax, the Texas Legislature made clear that its primary concern was with the property, both as the object of the tax and as the source of its payment.

Moreover, the tax must be an ad valorem tax before the School District may assess the taxes authorized by Chapter 37. The Texas Constitution in Article 7, Section 3, permits school districts such as Appellee to assess only ad valorem taxes, and in Article 8, Section 15, provides that such tax shall be a lien upon the property. Furthermore, Chapter 37 can only be accommodated in the Texas comprehensive tax system as an ad valorem tax and both the Texas Supreme Court and the School District so regarded it.

B. The tax imposed by Chapter 37 cannot be construed as a use tax comparable to the taxes involved in the Michigan cases. In *Borg-Warner* and *Continental Motors*, the taxes were personal obligations of the lessees and there were no liens on the property. And in *Murray Corp.*, the tax was upon the possessor of property and the statute could easily be amended to impose the tax for the privilege of using the property.

The fact that the Texas tax is a lien on the Ordnance Works not only serves to emphasize its ad valorem nature, but creates a serious interference with the ex-

ercise by the United States of its constitutional power with regard to its property in Texas.

ARGUMENT

I.

THE TAX UNCONSTITUTIONALLY DISCRIMINATES AGAINST THE UNITED STATES AND ITS LESSEES

A. Chapter 37 Is Invalid as Special Legislation Directed Solely Against Federal Lessees

Section 1 of Chapter 37 of the 1950 Texas Session Laws amended Article 5248 of the Revised Civil Statutes of Texas, 1925, to read as follows (see, *supra*, p. 3):

"The United States shall be secure in their possession and enjoyment of all lands acquired under the provisions of this title; and such lands and all improvements thereon shall be exempt from any taxation under the authority of this State so long as the same are held, owned, used and occupied by the United States for the purposes expressed in this title and not otherwise; * * * *provided, further, that any portion of said lands and improvements which is used and occupied by any person, firm, association of persons or corporation in its private capacity, or which is being used or occupied in the conduct of any private business or enterprise, shall be subject to taxation by this State and its political subdivisions.*"⁶

Since, as the School District expressly recognizes, Chapter 37 above "applies only to users of Federally-owned, tax-exempt property" (Motion pp. 6-7)⁷ the

⁶ Italics are supplied throughout this Brief unless otherwise noted.

⁷ For convenience, the School District's Motion to Dismiss will be referred to as "Motion" and its Brief in Support Thereof as "Brief."

statute constitutes special legislation against the Federal Government and for this reason without more is unconstitutional. See *Miller v. Milwaukee*, 272 U.S. 713, where this Court held invalid a state taxing statute which it found was similarly directed primarily against the Federal Government. See, also, *Schuykill Trust Co. v. Pennsylvania*, 296 U.S. 113.

In *Miller v. Milwaukee*, the Wisconsin Legislature had enacted a statute imposing a tax upon those dividends paid by a corporation to its stockholders out of income not taxable to the corporation. Finding that income from Federal bonds was the most conspicuous instance of such tax-exempt corporate income, the Court, speaking through Mr. Justice Holmes, struck down the tax as discriminatory against the Federal Government (272 U.S. 714-715):

"A system of taxation that applied to stockholders of all corporations equally might tax, we assume for purpose of argument, the stockholders of a corporation that had invested all its property in United States bonds. But it would be a different matter if the State selected such corporations, supposing a number of them to exist, and taxed their stockholders alone. * * * A tax very well may be upheld as against any casual effect it may have upon the bonds of the United States when passed with a different intent and not aimed at them, but it becomes a more serious attack upon their immunity when they are its obvious aim."

Inasmuch as Chapter 37 is explicitly aimed at Federal lessees, it follows *a fortiori* from *Miller v. Milwaukee* that this statute is similarly invalid. This is particularly so since the Texas taxing system leaves no room for the argument that the purpose of Chapter 37 was solely to place Federal lessees on a parity, tax-

wise, with lessees of other exempt property. Compare the explanation in *Pacific Co., Ltd. v. Johnson*, 285 U.S. 480, 494-495 of *Macallen Co. v. Massachusetts*, 279 U.S. 620; cf. *United States v. City of Detroit*, 355 U.S. 466, 472, fn. 2. On the contrary, Chapter 37 imposes upon Federal lessees a heavier tax than that upon lessees of other exempt property under the Texas tax system. This more onerous tax burden results in further unconstitutional discrimination against the United States and its lessees and so constitutes an additional reason why the Texas statute is invalid.

B. Chapter 37 Imposes a Heavier Tax Upon Federal Lessees Than Upon Lessees of Non-Federal Exempt Property

In holding that the taxes imposed by Chapter 37 of the 1950 Texas Session Laws do not result in unconstitutional discrimination against Federal lessees, the Texas Supreme Court relied heavily upon the Michigan cases^{*} decided by this Court in the 1957 Term.

Notwithstanding the conclusion of the Texas Court that these cases "clearly uphold the validity of the taxes assessed by the School District against . . . [Phillips] since March 17, 1950 insofar as the Federal Constitution and laws are concerned" (R. 185), the only similarity between the Michigan cases and the present case is that the Michigan laws and the statute here involved require lessees of Federal property to pay taxes measured by the full value of the property leased from the United States.

There the similarity ends and the two taxing systems go their separate ways. Unlike the Michigan tax,

^{*} *United States v. City of Detroit*, 355 U.S. 466 (*Borg-Warner*); *United States v. Township of Muskegon*, 355 U.S. 484 (*Continental Motors*); *City of Detroit v. Murray Corp.*, 355 U.S. 489.

which applied equally to *all* lessees of tax-exempt property, the Texas tax imposes a heavier tax burden upon Federal lessees than upon lessees of tax-exempt property. It is this crucial difference between the taxing system of Michigan and that of Texas which not only vitiates any comparison between the cases but, under established principles reiterated in the Michigan cases, calls for a contrary conclusion here. In these circumstances, far from supporting the conclusion below, the Michigan cases require a holding in this case that the Texas tax is unconstitutionally discriminatory.

1. The taxes involved in the Michigan cases applied uniformly to all lessees of exempt property

In *Borg-Warner*, the leading Michigan case, this Court expressly reaffirmed the unbroken doctrine that a State's taxing laws cannot discriminate against the United States or private persons who deal or contract with it (355 U.S. at 473):

"It still remains true, as it has from the beginning, that a tax may be invalid even though it does not fall directly on the United States if it operates so as to discriminate against the Government or those with whom it deals. Cf. *M'Culloch v. Maryland*, 4 Wheat. 316."

Although this Court went on to conclude that the Michigan statute did not discriminate against Federal lessees, it did so only after a careful examination satisfied it of the even-handed and non-discriminatory applicability of the tax there involved.

Thus, this Court noted that while Michigan law provided for the exemption from taxation of real property

⁹ See, also, *City of Detroit v. Murray Corp.*, 355 U.S. 489, 494, 495.

"owned by the Federal Government, the State, its political subdivisions, churches, charitable organizations and a great host of other entities" (355 U.S. at 473; see, also, *id.* note 5), the Michigan statute under attack subjected to taxation "*every* private party who uses exempt property in Michigan in connection with a business conducted for private gain." 355 U.S. at 473. In addition, the Court observed that there was no "showing that the tax is in fact administered to discriminate against those using federal property. To the contrary undisputed evidence introduced by appellees demonstrates that lessees of other exempt property have also been taxed." 355 U.S. at 474. In these circumstances, the Court held that the tax was non-discriminatory and so valid.¹⁰

2. Under Texas law, Federal lessees alone of all lessees of exempt property are required to pay taxes measured by the full fee value of the leased property

In contrast to the taxes sustained in the Michigan cases, the Texas tax in this case does not operate equally upon all lessees of tax-exempt property. In Texas the property of the State and its political subdivisions are exempt from taxation as well as a vast host of private entities. See Texas Constitution, Article 8, Section 2; Article 11, Section 9; Vernon's Annotated Civil Statutes,¹¹ Articles 7150, 7150d, 7150e,

¹⁰ Mr. Justice Harlan expressed the same view in his separate opinion (355 U.S. at 507): " * * * the state taxes here * * * do not operate in a discriminatory fashion by so measuring the tax on use or activities as to impose an unequal tax burden on lessees or users of government property *vis-a-vis* lessees, users, or owners of other tax-exempt or nonexempt property."

¹¹ Except as otherwise noted, all Texas statutes referred to in this Brief are cited from Vernon's Annotated Civil Statutes.

1269k. Section 22. Under Texas law, no tax has ever been imposed upon lessees of property thus exempted where the lease was for a term of less than three years, or where the term of the lease is conditional and of uncertain duration.

Article 7173, the only statutory provision (other than Chapter 37) authorizing the taxation of leasehold interests, provides:

“Property held under a lease for a term of three years or more, * * * belonging to this State or that is exempt by law from taxation in the hands of the owner thereof, shall be considered for all the purposes of taxation, as the property of the person so holding the same, except as otherwise specially provided by law. * * *

In the leading case of *Trammell v. Faught*, 74 Tex. 557, a county collector assessed taxes against lessees of tax-exempt State lands which had been leased to private parties for terms of six and ten years, subject, however, to the right of the lessor-State to terminate at any time in the event it should sell the lands. Despite the stated term of the leases, the Texas Supreme Court held that they could not be regarded as being “for a term of three years or more” within the meaning of Article 7173 in view of the State’s right to terminate at any time and that hence the lessees were not assessable for taxes thereon (74 Tex. at 558-559):

“The leases were conditional, subject to be determined at the will of the State, and we do not think the legislature intended that such uncertain interests in the land owned by the State should be the subject of taxation against the tenant. We do not think the contract under which appellant held the lands can be held to be a ‘lease for a term of three years or more,’ and unless it be such

a lease appellant is clearly not liable to taxation thereon."

This ruling has been settled law in Texas since 1889,^o unchanged either by Court decision or by legislative action.

Under the rule laid down in *Trammell v. Faught*, Phillips' lease is also not one "for a term of three years or more" within Article 7173, since the Phillips lease similarly reserved to the lessor, the United States, the right to terminate it on ninety days' notice in order to sell the property. See, *supra*, p. 6.¹² Notwithstanding the fact that under these circumstances, no tax would be assessable against Phillips if its lessor were a tax-exempt owner other than the United States, the Texas Supreme Court nevertheless held that Chapter 37 authorized the School District to assess taxes against Phillips on the property it had conditionally leased from the United States. Therefore, the discrimination against Federal lessees in favor of lessees of other exempt property is evident on the basis of the terms of the leases alone. The decision of the Court below would subject a Federal lessee to taxation even though the lease would not be taxable as one "for a term of three years or more" if held by a lessee from the State or other non-Federal tax-exempt agency, corporation, or institution.

But the foregoing is only the beginning of the discrimination existing against the United States and its lessees in the State Court's decision. If Phillips' lease is to be regarded as one "for a term of three

¹² The United States, in addition, could also terminate Phillips' lease upon thirty days' notice in the event of a national emergency. *Supra*, pp. 5-6.

years or more" and subject to taxation as such, Phillips as the lessee of Federal property would still be at a tax disadvantage. The tax assessed by the School District and upheld by the Texas Supreme Court against Phillips is measured by the entire fee in contrast to taxes imposed upon comparable non-Federal lessees which are measured solely by the value of their leasehold.

This more limited tax upon lessees of non-Federal exempt property is predicated on the Texas Court's long-standing construction of Article 7174, the companion provision to Article 7173. Article 7174 provides in pertinent part:

"Taxable leasehold estates shall be valued at such a price as they would bring at a fair voluntary sale for cash."

In *Daugherty v. Thompson*, 71 Tex. 192, the Texas Supreme Court, in rejecting an attempt to tax a long-term lessee of county school lands for the full fee value of the leased property, pointed out (71 Tex. at 200):

"The only law providing that a lessee shall pay taxes on leased property is found in article 4691, Revised Statutes [now Article 7173] which determines what leasehold estates shall be taxable.

"Subdivision 4 of article 4692, Revised Statutes [now Article 7174], can have application to no other leasehold estates than such as are made taxable by the preceding article, for in all other cases, in the absence of a statute directing to the contrary, the owner of the real estate must pay taxes on the entire value of the property whether leased or not.

"In cases to which article 4691 is applicable, it must be held that it was the intention of the Legis-

lature only to impose on the lessee a tax based on the value of the 'taxable leasehold estate' and not to impose upon him a tax based on a sum equal to the full value of the real estate. * * *

While the Texas Court in *Daugherty v. Thompson* went on to hold that school land leases such as those there involved were exempt from taxation in any case (71 Tex. at 200-202), the Court's construction of Articles 7173 and 7174 has been accepted throughout the years as the leading authority on the scope and meaning of these Articles. This interpretation was shortly thereafter applied by the Texas Supreme Court to leases of other exempt property (see *State v. Taylor*, 72 Tex. 297; *Taylor v. Robinson*, 72 Tex. 364, 369; cf. *Trammell v. Faught*, 74 Tex. 557, 559) and has been followed since as settled law in Texas.

This tax, therefore, is significantly different from the non-discriminatory State taxes which this Court has previously upheld in the Michigan cases. It is discriminatory not only as to its application to agencies and legal entities, but also as to the measure of value applied.

The Supreme Court of Texas recognized the disparity in taxation described above resulting from the application of established Texas legal principles. It undertook to minimize this discrimination against the United States by brushing aside as "no longer controlling" both of the relevant statutes and all but one of the critical decisions (R. 188). In addition, it held that "all property owned by private individuals is subject to taxation when not used for a purpose covered by the exemption statutes, and is taxable for the full value of the property" (R. 187). By these devices

the Texas Court sought to find a basis for upholding this discrimination against Federal lessees at the expense of the State's own statutes and decided law.

This effort by the Texas Supreme Court is in vain. Not only is its attempted invalidation of its own statutes and cases plainly untenable but also, if binding upon this Court, this invalidation results in even greater discrimination against Federal lessees. See Appendix A, *infra*, pp. 1a-4a. Moreover, the uneven tax treatment accorded Federal lessees is not in fact equated in the form of rent or otherwise. See Appendix B, *infra*, pp. 5a-7a.

Thus, under the Texas taxing structure, there is none of the even-handed non-discriminatory taxation found by this Court to exist in the Michigan cases. By requiring Federal lessees to pay heavier taxes than those imposed upon lessees of non-Federal exempt property, Chapter 37 clearly fails to provide "equal burdens and equal privileges for those of corresponding or similar situations." Cf. *Township of Muskegon v. Continental Motors Corp.*, 346 Mich. 218, 223, affirmed, 355 U.S. 484. Under the Texas statute, not only are Federal lessees without special privileges but also they are at a distinct economic disadvantage as against lessees of other exempt property. Therefore, the Michigan cases do not support the judgment below, but, on the contrary, they require a holding that the Texas statute is unconstitutional.

C. The Texas Tax Cannot be Supported as a Proper Classification

As further support for its conclusion, the Texas Court invoked the principle that the Federal Constitution does not require complete equality in taxation.

This was apparently to show that there is no constitutional bar to a State's subjecting persons dealing with the Federal Government to heavier taxes. In elaboration upon these arguments, the School District urges that there was a reasonable basis for classifying Federal lessees separately. In our opinion, as shown below, neither of these contentions has any merit.

1. The States may not impose upon persons dealing with the Federal Government taxes heavier than those imposed upon other persons similarly situated

The Texas Court cited the holdings of this Court in cases such as *Green v. Frazier*, 253 U.S. 233, and *Southwestern Oil Company v. State of Texas*, 217 U.S. 114, that the Constitution does not require strict equality in taxation and left to the States wide powers of classification in administering their tax systems. These holdings, while accurately reflecting the law in the areas in which they are applicable, have no relevance in the present case and so do not afford any support for the Texas Court's decision.

None of the long list of cases elaborately detailed by the School District on this point (see Motion pp. 10, 13-16; Brief pp. 2-12), in any way involve an attempt by a state to tax persons dealing with the Federal Government. Typically in these cases the individual attacking the tax is unquestionably subject to state taxation as a purely private person who is resident or doing business within the state. The attack is predicated solely upon the Due Process or Equal Protection Clauses of the Fourteenth Amendment. Out of deference to the States' needs for revenue and in order to give full scope to the States' sovereign exercise of their power to tax, this Court has understandably required only that the tax classifications evolved by the State

Legislatures have a reasonable basis related to the subject of the statutes. This Court has accordingly limited its invalidation of such classifications to those cases in which the classifications are arbitrary or invidiously discriminatory. See, *infra* pp. 27-28.

Such situations are a far cry from those presented when, as here, a State undertakes to tax persons dealing with the Federal Government. In this latter situation, the needs of the States for revenue do not stand alone, and the problem is not resolved solely with reference to the limitations imposed by the Fourteenth Amendment. Instead, when a State undertakes to tax those dealing with the Federal Government, its need for revenue clashes head-on with the equally essential need of the Federal Government to be free to perform its functions without restraint or interference by the States. See, e.g., *James v. Dravo Contracting Co.*, 302 U.S. 134, 150; *Helvering v. Gerhardt*, 304 U.S. 405, 416; *Metcalf & Eddy v. Mitchell*, 269 U.S. 514, 521-522.

In these circumstances the validity of the particular State tax has turned upon the difficult and delicate balancing of these conflicting needs. Furthermore, not only must consideration be given to the Fourteenth Amendment, but also to the Supremacy Clause and the implications of our Federal system under which two governments, National and State, operate at the same time and in the same territory. In view of this conflicting need of the Federal Government and the additional constitutional problems raised thereby, the cases relied on by the School District clearly do not furnish an answer to the issue here presented.

Although, as pointed out by the School District (Brief pp. 13-14), this Court in recent years has

shifted the balance of these conflicting needs so as to broaden the scope of permissible state taxation of persons dealing with the Federal Government, the maximum state taxes thus sanctioned have been those which bear equally and even-handedly upon others similarly situated. The balance has been struck at this point because it accords appropriate and equitable weight to respective State and Federal interests. On the one hand, by such taxation those dealing with the Federal Government are required to bear their equitable share of the costs of providing local service and are without the special advantages which might accrue from a tax exemption. On the other hand, such limited taxation keeps the interference with the Federal Government's performance of its functions to a minimum.

Because even-handed taxation accommodates both the Federal and State interests, this principle has been the touchstone throughout the waning of intergovernmental tax immunity. As the Court is aware, the retreat from the broad immunity doctrine was fostered by the Government in its brief filed in *James v. Dravo Contracting Co.*, 302 U.S. 134. There the Department of Justice, for the first time, urged the Court to discard economic incidence as a sufficient basis of itself to require invalidation of state taxation upon Federal contractors and instead "to permit those who contract with the Government to be subjected to the *normal tax burdens*" in recognition of the services and benefits furnished by the local government. See Brief for the United States as *Amicus Curiae*, in *James v. Dravo Contracting Co.*, No. 3, October Term 1937, at p. 3.

At the same time that the Government was urging the propriety of taxes upon Federal contractors which placed them in a parity taxwise with others similarly

situated, the Government drew a sharp line against the imposition of heavier and special burdens upon those who dealt with it:

"The tax which the State or the Federal Government imposes upon those who deal with the other must be nondiscriminatory if it is to be valid. Neither the Nation nor the State can be permitted to frame its tax laws with an eye to imposing *special* burdens upon the other. Such a tax would be hostile in purpose and intolerable in legal effect." (*id.* pp. 29-30; see, also, *id.* at pp. 3-4, 23, 25-26, 28). (Italics in original)

This Court has recognized the soundness of this position and has so drawn the line between permissible and prohibited taxation of those dealing with the Federal Government. In permitting state taxation upon those dealing with Government in the *Dravo* case (302 U.S. at 149, 158) and subsequent cases, the Court has uniformly stressed that the burden of the tax being sanctioned was no greater than that imposed upon others in comparable situations.¹³ Thus, in *Helvering*

¹³ We do not mean to imply that this Court had not previously been alert to possible discrimination against persons dealing with the Federal Government. To the contrary, although prior to *Dravo* the criteria governing the scope of the intergovernmental tax immunity doctrine were different, the Court nevertheless repeatedly noted and stressed the necessity that the taxes be nondiscriminatory in order to be permissible under the Constitution. See, e.g., *Metcalf & Eddy v. Mitchell*, 269 U.S. 514, 523-524; *Willcuts v. Bunn*, 282 U.S. 216, 225, 226, 227, 229; *Group No. 1 Oil Corp. v. Bass*, 283 U.S. 279, 282; *Pacific Co., Ltd. v. Johnson*, 285 U.S. 480, 493, 494, 495, 496; *Fox Film Corp. v. Doyal*, 286 U.S. 123, 131; *Indian Territory Illuminating Oil Co. v. Board of Equalization*, 288 U.S. 325, 327; *Burnet v. A. T. Jergins Trust*, 288 U.S. 508, 514; *Federal Compress & Warehouse Co. v. McLean*, 291 U.S. 17, 23; *Taber v. Indian Territory Illuminating Oil Co.*, 300 U.S. 1, 3, 4, 5.

v. Mountain Producers Corp., 303 U.S. 376, the Court emphasized that "where it merely appears that one operating under a government contract or lease is subjected to a tax with respect to his profits *on the same basis as others* who are engaged in similar businesses, there is no sufficient ground for holding that the effect upon the Government is other than indirect and remote" (at pp. 386-387).

In the same vein the Court in *Helvering v. Gerhardt*, 304 U.S. 405, ruled that discrimination is "in itself a sufficient ground for holding invalid any form of state taxation adversely affecting the use or enjoyment of federal instrumentalities" (at p. 413). The Court then sustained the Federal tax upon income of employees of the New York Port Authority, pointing out that, not only do these taxpayers enjoy the benefits and protection of the laws of the United States and are under a duty to support that Government, but also that (304 U.S. at 420):

"A non-discriminatory tax laid on their net income, *in common with that of all other members of the community*, could by no reasonable probability be considered to preclude the performance of the function which New York and New Jersey have undertaken, or to obstruct it more than like private enterprises are obstructed by our taxing system."

See, also, *Graves v. New York ex rel O'Keefe*, 306 U.S. 466, 480, 487; *Alabama v. King & Boozer*, 314 U.S. 1, 8; *Curry v. United States*, 314 U.S. 14; *Oklahoma Tax Commission v. Texas Co.*, 336 U.S. 342, 343, 362, 363; cf. *Henneford v. Silas Mason Co.*, 300 U.S. 577, 584; *Penn Dairies v. Milk Control Commission*, 318 U.S. 261, 269.

As these cases, as well as the recent Michigan cases (see, *supra* pp. 15-16), make clear, the Court has consistently required tax equality for those dealing with the Government and has not sanctioned heavier taxes for any reason. Thus, Government contractors and lessees are to be treated, from a tax point of view, no differently from others similarly situated; just as they do not have any constitutional right to be favored by tax exemption or lighter taxes, so also they may not be discriminated against by being required to bear a heavier tax burden.¹⁴ Since the 1950 Texas statute does impose such a heavier tax upon Federal lessees, it appears to us to be abundantly clear that our Federal system of government and the Supremacy Clause stand in the way of the validity of such a discriminatory tax classification.

2. Assuming Federal lessees may be classified separately, there is no reasonable basis here for such classification

Even if it were permissible to classify Federal lessees separately so as to impose a heavier tax burden upon them, the classification must have a reasonable basis in order not to violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Furthermore, as this Court has said, before a classification is considered reasonable, it "must rest upon some ground of difference having a fair and substantial

¹⁴ In the analogous area of interstate commerce, this Court has similarly permitted only nondiscriminatory taxes, i.e., taxes upon out of state business not heavier than those imposed upon their local counterparts, in order to preserve the freedom of interstate commerce prescribed by the Constitution. See, e.g., *Memphis Steam Laundry v. Stone*, 342 U.S. 389; *Nippert v. Richmond*, 327 U.S. 416; *Best & Co. v. Maxwell*, 311 U.S. 454; *Hale v. Bimco Trading Inc.*, 306 U.S. 375; *I. M. Darnell & Sons Co. v. Memphis*, 208 U.S. 113; *Walton v. Missouri*, 91 U.S. 275.

relation to the object of the legislation." See *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 527; *Morey v. Doud*, 354 U.S. 457, 465-466 and cases there cited; cf. *Smith v. Cahoon*, 283 U.S. 553, 567; *Hartford S.B.I. & Ins. Co. v. Harrison*, 301 U.S. 459, 463.

Unlike the usual situation where the statute's purpose can be discovered only by inference, the 1950 Texas statute leaves no doubt that its objective was solely to raise revenue by taxing those who deal with the United States. In setting out the legislative justification for suspending the State's Constitutional Rule requiring bills to be read on three several days, that Act explicitly states in Section 4 that an emergency has been created by:

"[t]he fact that there is no adequate provision in the Statutes of this State providing for taxation of personal property located on lands belonging to the United States which are privately owned by persons, firms, associations of persons and corporations, and lands and improvements, although owned by the United States of America, which are used and occupied in the conduct of private businesses and enterprises by persons, firms, associations of persons and corporations; and the further fact that the funds being lost by reason of these properties escaping taxation are badly needed by the State and its political subdivisions * * *"

Since the purpose of Chapter 37 is limited to raising revenue, the grounds for classification advanced by the School District appear to have no fair and substantial basis which would justify assessing heavier taxes against lessees of Federal-exempt property than those assessed against lessees of non-Federal exempt property.

In support of the discriminatory classification, the School District urges¹⁵ that "the State of Texas does not own many millions of dollars worth of prime industrial plants that are required, by the demands of national security, to be maintained in a state of semi-readiness for arms production and that can best be kept in such status by being leased to private industry" (Motion p. 15; see, also, Brief p. 7). This argument is specious. In the first place, neither the intrinsic nor market value of the property involved could support such a classification. Although Texas and its political subdivisions may not own industrial plants reserved for national defense,¹⁶ the State and its agencies do own and lease properties of even greater value. To cite the most outstanding example of such properties, as is generally known, the extremely rich and prolific oil and gas lands of Texas and its subdivisions are periodically leased for millions of dollars to private corporations. In the second place, the value of Federal and State property could not be the basis for the classification since on its face the Texas statute extends to all Federally owned property in Texas, large

¹⁵ Unlike the School District, the Texas Court does not attempt to put forward any justification for classifying Federal lessees separately from lessees of non-Federal property.

¹⁶ The fact that the Federal property involved is an industrial plant reserved by the Government in order to facilitate defense production in the event of an emergency seems to us to militate against, rather than to support, the School District's argument. Whatever might be the propriety of imposing heavier taxes upon other Federal lessees, the imposition of more onerous burdens upon lessees of such defense plants would appear to be peculiarly inappropriate for it hinders the Government in its program of being prepared to discharge its supreme function of defending the security of the Nation.

or small, valuable or not, which is leased to private enterprise. Consequently, the value of the property involved does not provide any basis, much less a reasonable one, for the attempted classification.

On another ground the School District claims that this discriminatory classification is reasonable. It contends that the United States as the lessees' landlord pays no taxes on the leased premises although these lessees employ labor and their employees have children who attend local schools (Motion p. 16; see, also, Brief pp. 7-8). Here again the argument is beside the point. First, there is nothing in Chapter 37 to indicate that its purpose was to raise funds for school use as distinct from general uses within the State.

Second, even if the objective of Chapter 37 were so limited, there would be no reason for requiring Federal lessees to pay heavier taxes than those imposed upon lessees of non-Federal exempt property. Congress has recognized the schooling problems created by the presence of its lessees' children and has authorized financial aid to local schools because of these children (20 U.S.C. 236, *et seq.*). Indeed, the School District has admittedly received substantial amounts of such Federal aid (R. 29-31, 34-35). In contrast, the landlords of lessees of non-Federal exempt property in Texas do not make comparable voluntary financial contributions nor are they required to pay any such taxes although their lessees similarly have employees whose children attend local schools. Moreover, since the taxing authority in Texas frequently is a political subdivision separate and distinct from the State or political subdivision receiving the full rental, the taxing authority receives no offset in rental to compensate for the lower

taxes paid by the lessees of such non-Federal exempt property.

The argument of the School District at most supports the assessing of the taxes imposed by Chapter 37 equally against *all* lessees of exempt property, as was done in the *Continental Motor* case quoted in this connection by the School District (see Motion p. 16). To accept the School District's argument as a justification for requiring the payment of heavier taxes by Federal lessees alone would mean, in the words of the Michigan court quoted by the School District (Motion p. 16), that a lessee of non-Federal exempt property "becomes specially privileged and notably favored over his local classmates." See, also, *Borg-Warner*, 355 U.S. at 474.

Finally, the School District argues that the classification is appropriate because it operates to "foster its local interests and insure its revenues" (Brief p. 7), and "within proper constitutional limitations, self-interests may provide sufficient grounds for distinction in tax treatment" (Motion p. 10). However, the very cases cited by the School District (*Ohio Oil Company v. Conaway*, 281 U.S. 146; *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522) do not support this contention and in fact dictate a contrary result.

In the *Ohio Oil* case the Court stated (281 U.S. at 159):

"When dealing with their proper domestic concerns, and not trenching upon the prerogatives of the national government or violating the guarantees of the Federal Constitution, the States have the attribute of sovereign powers in devising their fiscal systems to insure revenue and foster their local interests."

Since the local interests which the School District claims are fostered by Chapter 37 are being benefited at the expense and to the detriment of the Federal Government and those with whom it deals, it is obvious that such fostering is a prohibited "trenching upon the prerogatives of the national government."

Similarly, in *Allied Stores*, the fostering of local interests permitted by this Court occurred in a situation where the classification imposed a heavier tax burden upon certain residents as against non-residents. In upholding this classification, the Court distinguished *Wheeling Steel Corp. v. Glander*, 337 U.S. 562, where in a reverse situation, i.e., the heavier tax burden was upon non-residents as against residents, the tax had been held invalid. Concurring in *Allied Stores*, Mr. Justice Brennan commented (358 U.S. at 533):

" * * * The proper analysis, it seems to me, is that *Wheeling* applied the Equal Protection Clause to give effect to its role to protect our federalism by denying Ohio the power constitutionally to discriminate in favor of its own residents against the residents of other state members of our federation. On the other hand, in the present case, Ohio's classification based on residence operates *against* Ohio residents and clearly presents no state action disruptive of the federal pattern. There is, therefore, no reason to judge the state action mechanically by the same principles as state efforts to favor residents." (Italics in original)

This analysis, we believe, is particularly applicable here. Appellee admits (Motion p. 10) that "[n]aturally the self-interest of the State, for itself and its creatures, causes it to be more concerned for its own exemptions than for those of other entities * * *." This Court has

long been aware of this natural tendency of the States to foster self-interests and has been alert to counteract it in the interstate commerce field in order to protect "the great constitutional purpose of the fathers in giving to Congress the power 'To regulate Commerce with foreign Nations and among the several States' ". *Nippert v. Richmond*, 327 U.S. 416, 425; see, also, cases cited *supra* p. 27, fn. 14. Since our Federal pattern would appear to be of equal if not greater importance than local considerations affecting interstate commerce the Federal Government similarly should be free to exercise its constitutional functions. Therefore, the fostering of local interests plainly cannot be sanctioned as a justification for imposing discriminatory taxes upon those dealing with the Federal Government when those similarly situated who deal with the State pay less taxes or no tax at all.

D. The Act of August 5, 1947 C. 493, 61 Stat. 774,¹⁷ Does Not Authorize the Imposition of Heavier Tax Burdens Upon Federal Lessees

The School District further argues that Chapter 37 is free from constitutional infirmity by contending that the tax immunity of the United States does not extend to its lessees (Motion p. 11) and even if it did, Congress has waived this immunity by the Act of August 5, 1947 C. 493, 61 Stat. 774 (Motion pp. 11-12; Brief p. 15). This argument has no validity upon examination of the Act. Although Section 6 of the 1947 Act permits the States to subject Federal lessees to local taxation, there is nothing in that Act, its legislative history or

¹⁷ It was under the authority of this Act that the Cactus Ordinance Works was leased by the Secretary of the Army to Phillips' parent, Phillips Petroleum Company. See, *supra* p. 5.

any of the cases decided thereunder to justify the imposition of a disproportionate tax burden upon Federal lessees such as is here involved.

Section 6 of the 1947 Act reads as follows:

"The lessee's interest, made or created pursuant to the provisions of this Act, shall be made subject to State or local taxation. Any lease of property authorized under the provisions of this Act shall contain a provision that if and to the extent that such property is made taxable by State and local governments by Act of Congress, in such event the terms of such lease shall be renegotiated."

By merely providing for the taxation of Federal lessees' interests without more, Congress plainly manifested an intention to permit only that taxation which subjected its lessees to a burden no greater than that imposed upon others similarly situated. Since an even-handed tax best accommodates the local needs for revenue and the Federal Government's need for freedom in the exercise of its functions, if Congress intended to permit a more onerous tax upon Federal lessees it would certainly have explicitly enacted a provision to that effect. The absence of any such provision patently demonstrates that Congress had no such intention.

That Section 6 of the 1947 Act sanctions only non-discriminatory taxation of Federal lessees is further evident from its legislative history. The Committee Hearings in both the House and Senate show that the Congress was concerned with providing some alleviation of local financial problems and minimizing the economic advantages which might accrue to Federal lessees by virtue of the Constitutional tax exemption

of the United States Government.¹⁸ At the same time there is nothing whatever in this legislative history to suggest that the Congress intended that Federal lessees should be required to bear more than their fair and equal share of the local tax burden or that they should be placed at an economic disadvantage with their State and local competitors. There appears to be no doubt that in passing the 1947 Act Congress was thinking solely in terms of nondiscriminatory taxation of leaseholds valued as such and never contemplated a disproportionate tax burden against the United States and its lessees.

The several cases cited by the School District in connection with the 1947 Act (Brief pp. 15-16) do not support its conclusion that Section 6 permits discriminatory taxation against Federal lessees. The cases cited (*Offutt Housing Co. v. County of Sarpy*, 351 U.S. 253 and *Fort Dix Apartments Corp. v. Borough of Wrightstown*, 225 F. 2d 473 (C.A. 3), *certiorari denied*, 351 U.S. 962) do not hold more than that Section 6 authorized local taxation upon a lessee's interest in housing constructed under the Wherry Military Housing Act of 1949.

The state cases which the School District also cites go no further. In contrast, the California Supreme Court, in ruling that there was no local law providing for the taxation of the interests of Federal lessees, pointed out (*General Dynamics Corp. v. County of Los Angeles*, 51 Cal. 2d 59, 66-67):

¹⁸ See Hearings before Subcommittee No. 3 of the House Armed Services Committee, 80th Cong., 1st Sess., on H.R. 3471 at pp. 2353, 2354; Hearings before the Senate Armed Services Committee, 80th Cong., 1st Sess., on S. 1198 (H.R. 3471) at pp. 27, 28-32.

... * * * To be valid a use or possession tax would have to apply to *all tax exempt property so as not to discriminate against the private use or possession of property owned by the United States*, and it is for the Legislature, not the court, to determine whether such a *nondiscriminatory* tax on possessory interests in tax exempt personal property should be adopted and to determine the measure of such tax."

Since Phillips is not claiming a complete exemption from State taxation, but rather that the State taxes imposed upon it as a Federal lessee must be nondiscriminatory, the Act of August 5, 1947 does not militate against Phillips' position. On the contrary, as we read that Act, it affirmatively supports this conclusion.

Therefore we submit that the tax imposed by Chapter 37 unconstitutionally discriminates against Federal lessees by requiring them to bear a tax burden heavier than that imposed upon lessees of other exempt property.

II.

THE TAX IMPOSED IS AN UNCONSTITUTIONAL AD VALOREM TAX UPON FEDERAL PROPERTY ASSESSED AGAINST PHILLIPS

In addition to the fact that the tax imposed is unconstitutional because it discriminates against Federal lessees, it is also invalid because it is an ad valorem tax levied against the property of the United States. Of fundamental importance to the determination of the nature of the tax here involved is an evaluation of the impact of the recent Michigan cases upon *United States v. Allegheny County*, 322 U.S. 174. See, also, *American Motors Corp. v. City of Kenosha*, 356 U.S. 21, affirming *per curiam* 274 Wis. 315. In the Michigan cases the Court distinguished *Allegheny County* and

reached a contrary result although the facts in the *Murray Corp.* case appear to be analogous to those in *Allegheny County*.

As we read these cases, there is no necessary inconsistency in decision or disagreement among the various Justices on basic principles.¹⁹ Rather, the differences in result appear to stem from divergent views as to the legal incidence of the respective taxes involved. Thus in the Michigan cases the majority of the Court construed the taxes to be properly assessed against the persons using the Government property and the event giving rise to taxability was the use and enjoyment of the property. The taxes were held to be valid *use* taxes free from constitutional infirmities and the value of the property was merely a means of measuring the tax.

On the other hand, in *Allegheny County* a majority of this Court found that the Pennsylvania tax at issue was laid directly upon Federal property even though it was assessed against the person in possession thereof. The tax was accordingly held by this Court to be unconstitutional as an ad valorem tax. Since the tax imposed by Chapter 37 of the Texas Session Laws in this case is laid solely upon Federal property, the present case is controlled by *Allegheny County* rather than by the Michigan cases.

¹⁹ In both *Allegheny County* and the Michigan cases the Court was agreed that "a State cannot constitutionally levy a tax directly against the United States or its property without the consent of Congress," 355 U.S. at 469; see, also, 322 U.S. at 177.

A. The Incidence of the Texas Tax Is Upon Federal Property

1. Under the taxing system involved in Allegheny County, the tax was directly upon the property

In *Allegheny County*, certain machinery which the Government had leased to Mesta Machine Company to use in connection with Government contracts, had been bolted to the foundations of plants owned by Mesta. The local authorities, in assessing taxes against Mesta's real property, increased the amount of the assessment by the value of the Government machinery and the Pennsylvania Supreme Court sustained the tax as a valid tax upon Mesta's real estate (347 Pa. 191). In reversing, this Court noted (322 U.S. at 184-185):

"It is not contended that the scheme of taxation employed by Pennsylvania is anything other than the old and widely used ad valorem general property tax. This taxation plan involves the identification and valuation of the variable individual holdings to be taxed, commonly called the assessment, the application of a uniform rate calculated on the need for public revenues, and the collection, in default of payment, by distraint and sale of the property assessed and taxed. This form of taxation is not regarded primarily as a form of personal taxation but rather as a tax against the property as a thing. * * * In both theory and practice the property is the subject of the tax and stands as security for its payment.

"The Pennsylvania statutes embody this scheme of taxation. * * * The basic provision reads: 'The following *subjects and property* shall * * * be valued and assessed, and *subject to taxation*.' Taxes are 'declared to be a *first lien on said property*.' * * * It is only under these legislative provisions that the tax in question is laid." (Italics in original)

Commenting further that the procedure followed by the assessors was "consistent with no other theory than that the machinery itself was being assessed and taxed exactly as land was being assessed and taxed" (322 U.S. at 185), the Court concluded that, notwithstanding the disavowal of any lien on the Government machinery (322 U.S. at 187), the tax was directly upon the Government machinery although assessed against Mesta and hence was unconstitutional.

Since the Texas tax, as we shall show, *infra* pp. 39-45, similarly is "simply and forthrightly imposed on the property itself, not on the privilege of using or possessing it" (*Borg-Warner*, 355 U.S. at 471), this tax, like that in *Allegheny County*, is an unconstitutional attempt to impose an ad valorem tax upon Federal property even though it is assessed against the lessee thereof.

2. The Texas statute expressly imposes the tax upon the property itself

The terms of Chapter 37 leave no doubt as to the incidence of the tax thereby imposed. The 1950 statute plainly indicates in its title, body and emergency clause that the tax was upon the Federal property itself and not upon the use thereof. Section 1 of Chapter 37 provides in pertinent part:

" * * * any portion of said lands and improvements [i.e., held, owned, used or occupied by the United States] which is used and occupied by any person, firm, association of persons or corporation in its private capacity, or which is being used or occupied in the conduct of any private business or enterprise shall be subject to taxation by this State and its political subdivisions."

Since the operative language is "*any portion of said lands* * * * shall be subject to taxation by this State and its political subdivisions," it is clear that Chapter 37 by its express terms lays the tax directly upon Federal property. The intermediate "which" clauses are obviously restrictive and are intended solely to define the categories of Federal property which the statute seeks to subject to taxation. This restriction was necessary since Article 5248, prior to its amendment by Chapter 37, recognized the general and all inclusive exemption of Federal property from state taxation. Consequently, the "which" clauses serve merely to segregate the Federal lands and improvements being taxed from the Federal lands and improvements which continue to remain exempt under the law as amended.

The Texas tax is an ad valorem tax upon property. The statute contains no provision specifying the rate of taxation or who should pay the tax. By failing to designate the taxpayer, the Texas Legislature clearly manifested its primary concern to tax the property. Since such a tax has all the characteristics of an ad valorem tax and accords in all respects with the Texas ad valorem tax system (see, *infra* pp. 41-42, 8a-10a), it is apparent that the Texas Legislature intended that Chapter 37 be a part of that tax system. The attempt of the Texas Supreme Court to alter the thrust of Chapter 37 by speculating that the Legislature meant to tax only a lessee of the United States and not the United States does not obliterate the fact that the Legislature was thinking solely in terms of ad valorem taxes and it intended to impose the tax upon the property as was customary in Texas. Indeed, as will be

shown below, use taxes as such are foreign to the Texas taxing system.

3. This construction of Chapter 37 is required by the Texas Constitution and accords with the Texas taxing system

Although the Texas Constitution permits the Legislature to impose taxes other than ad valorem taxes (see Texas Constitution, Article 8, Sections 1, 17); school districts such as Appellee may assess only ad valorem taxes. The Texas Constitution, Article 7, Section 3, provides in pertinent part:

“ * * * the Legislature shall be authorized to pass laws for the assessment and collection of taxes in all said districts and for the management and control of the public school or schools of such districts, * * * and the Legislature may authorize an additional ad valorem tax to be levied and collected within all school districts * * * for the further maintenance of public free schools, and for the erection and equipment of school buildings therein; provided that a majority of the qualified property taxpaying voters of the district voting at an election to be held for that purpose, shall vote such tax not to exceed in any one year one (\$1.00) dollar on the one hundred dollars valuation of the property subject to taxation in such district, but the limitation upon the amount of the school district tax authorized herein shall not apply to incorporated cities or towns constituting separate and independent school districts, nor to independent or common school districts created by general or special law.”

See, also, Texas Constitution, Article 7, Section 3a; *Crabb v. Celeste Independent School District*, 105 Tex. 194; Fielder, *The Texas Tax Structure*, 20 Vernon's Annotated Civil Statutes, pp. vii, xxx-xxxi (hereafter

cited as Fielder). Since the School District's taxing power is limited by the State Constitution to ad valorem taxation, the tax imposed by Chapter 37 must perforce be an ad valorem tax before the School District under the Texas Constitution may lawfully assess the taxes.

Furthermore, although the Texas Legislature is empowered by the Texas Constitution to assess taxes upon persons for the use of property owned by others, it has not in practice imposed any such tax. See Fielder, *passim*. Consequently, should Chapter 37 be construed as imposing such a use tax, it would stand virtually alone in the Texas taxing structure. In contrast, the Texas Legislature has over a period of years provided a complete and comprehensive system for assessing and collecting ad valorem taxes. Significantly, under this system not only is the tax laid upon the property and assessed against the owner thereof as distinct from the person in possession, but the ad valorem tax becomes a lien against the property upon which it is laid and the property is primarily looked to for payment of the tax.

The Texas Constitutional provisions and statutory enactments relating to the prevailing ad valorem system of taxation are discussed in detail in Appendix C, *infra*, pp. 8a-10a. Under Texas Constitutional law a tax of the nature assessed here becomes a lien on the property immediately. This is inconsistent, of course, with any argument that the tax assessed against Phillips is a use tax and not an ad valorem tax. A use tax is not collectible by a property lien.

4. Even the Texas Supreme Court and the School District construe Chapter 37 as imposing an ad valorem tax

Examination of the opinion of the Texas Supreme Court reveals that it actually regards Chapter 37 as imposing an ad valorem tax and not a use tax upon the property leased to Phillips. Thus, at the same time that it sought to characterize the tax as one against the user or occupier of the property, the Texas Court explicitly agreed with Phillips' contentions that Chapter 37 applies to the property itself and makes the entire property interest subject to taxation (R. 180-181).²⁰ In addition, the Texas Court strengthens this agreement by reference to Article 8, Section 1, of the Texas Constitution which provides, in the Texas Court's own words, "for taxation of all property within the State in proportion to its value" (R. 181). Both this constitutional provision and the statutory provisions, Articles 7145 and 7146, to which the Texas Court also referred (R. 181), relate only to an ad valorem tax system. Compare *Allegheny County* quoted *supra* pp. 38-39. This is also true of the statutory provisions (Articles 7173 and 7174) and the cases which the Court below undertook to set aside in its opinion as being "no longer controlling" (R. 187-188) in an effort to meet Phillips' argument of unconstitutional discrimination.²¹

²⁰ Although the Texas Court sought to fit this case within the Michigan cases, at no place in its opinion did it explicitly describe the tax as a use tax assessed upon the privilege of using or holding that property. The furthest the Texas Court went was to say that the tax was assessed against the user or occupier of the property.

²¹ The trial court's judgment was also cast in terms of ad valorem taxation. It states (R. 48):

• • • that such property is subject to taxation by the defendant, Dumas Independent School District, of Moore County,

Similarly, the School District itself has consistently read Chapter 37 as imposing an *ad valorem* tax. It manifested this construction administratively by following the usual *ad valorem* tax procedures in assessing and placing the Ordnance Works upon the tax rolls in the name of Phillips as owner thereof. The tax collector certified that upon refusal of Phillips to render the property for taxation, he had listed the property himself and assessed it in compliance with the State laws regulating the assessment of unrendered property (R. 92-102). See *infra* p. 9a. In addition, the various assessment sheets named Phillips as its owner²² and described the property as the subject of the tax. See (R. 92, 94, 96, 97, 98, 99, 101).

Not only has the School District administratively read Chapter 37 as taxing the property itself, but it has so construed the statute throughout the judicial proceedings. Indeed, despite this Court's decisions in the Michigan cases, it has continued this construction as recently as its Motion to Dismiss. The School District in its Motion explicitly characterizes its proceeding as one involving "the *ad valorem* taxation by

Texas, as a political subdivision of the State of Texas, and that the same is taxable to Phillips Chemical Company for the years beginning March 17, 1950, and for the tax years 1951, 1952, 1953 and 1954, and that the property was duly and legally assessed for taxes to Phillips Chemical Company for said years beginning March 17, 1950."

²² The collector had named Phillips Petroleum Company as owner (See, e.g., R. 92-93). However, before the Board of Equalization this was changed to name Appellant, Phillips Chemical Company, as owner (R. 107).

²³ The assessment sheets set out the appropriate land descriptions in detail. Since it appears so many times in the record and it is so lengthy, the parties have stipulated that the notation appearing in the assessment sheets as reproduced in the record (see e.g., R. 92) be substituted for the detailed description

appellee, a political subdivision of the State of Texas, of the lessee's interest in Cactus Ordnance Works * * * " (Motion, p. 1).

B. The Texas Tax Cannot be Construed as a Use Tax

Despite their recognition that Chapter 37 seeks to impose an ad valorem tax upon Federal property, both the Texas Supreme Court and the School District rely on the Michigan cases to sustain the Texas tax against invalidity in this respect. However, as shown below, there are fundamental differences between the Texas and Michigan tax structures which preclude a holding based on the Michigan cases that the tax imposed by Texas is a personal tax upon the privilege of using the Federal Government's property.

1. The Borg-Warner and Continental Motors cases are not applicable

In *Borg-Warner* and *Continental Motors*, the tax imposed by the applicable Michigan statute clearly was a personal obligation of the lessee of the property. As paraphrased by this Court, that statute provided in Section 1 that "when tax exempt real property is used by a private party in a business conducted for profit the *private party* is subject to taxation to the same extent as though he owned the property" (355 U.S. at 467).²⁴ Section 2 of the statute provided that "Such

²⁴ The Texas Court apparently was confused as to the taxable object of the Michigan statute as a result of the inadvertent omission from the Michigan statute of the subject of the sentence defining its object. Although the Michigan court and this Court had no difficulty in recognizing that the omitted language referred to the user of the property (see 355 U.S. at 467; 345 Mich. 601, 606), the Texas Court inserted "it" as the omitted subject, thus obviously interpreting the omission as referring to the property itself. (See R. 182).

taxes shall not become a lien against the property. When due, such taxes shall constitute a debt due from the lessee or user to the township * * * for which the taxes were assessed and shall be recoverable by direct action of assumpsit." See 355 U.S. at 467, fn. 1. This Court construed these provisions as meaning that:

"Any taxes due under the statute are the personal obligation of the private lessee or user. The owner is not liable for their payment nor is the property itself subject to any lien if they remain unpaid. So far as the United States is concerned as the owner of the exempt property used in this case it seems clear that there was no attempt to levy against its property or treasury." (355 U.S. at 469)

The Court concluded therefore that the Michigan tax involved was not an ad valorem tax, but rather a personal tax upon the privilege of using the property.

The situations presented in these two Michigan cases were entirely different from that of the present case. Unlike these Michigan cases, the Texas tax imposed by Chapter 37 is clearly levied upon the property and not upon the persons using it. *Supra*, pp. 39-40. In addition, as stated before, the School District under the Texas Constitution is authorized to impose only ad valorem taxes and under the Texas law such taxes are a lien upon the property.²⁵ It is submitted, there-

²⁵ We realize, of course, that the School District could not in fact enforce such a lien upon the property of the United States. But the lien in *Allegheny County* did not even reach the Federal property involved, yet this Court held that tax to be upon the Government property although assessed to the lessee. See 322 U.S. at 187. Moreover, as pointed out by Mr. Justice Frankfurter in his separate opinion in the Michigan cases (355 U.S. at 504-505):

"Even a nondiscriminatory tax, if it is expressly laid on

fore, that the Court's holdings in the *Borg-Warner* and *Continental Motors* cases have no applicability here since the Texas and Michigan systems differ so radically.

2. The theory of the *Murray Corp.* case is also inapplicable

While the situation in the *Murray Corp.* case (the third of the Michigan cases) appears to be closer to the present case than were the situations in the Michigan cases discussed above, there nevertheless are also significant differences which differentiate the *Murray* case from the one at bar. As the Court noted in *James v. Dravo Contracting Co.*, 302 U.S. 134, 150, the resolution of the intergovernmental tax problems requires "the observing of close distinctions in order to maintain the essential freedom of government in performing its functions, without unduly limiting the taxing power which is equally essential to both Nation and State under our dual system."

The differences between the facts in *Murray* and those in this case are evident. In *Murray Corp.* the "taxes were assessed from the beginning 'subject to prior rights of the Federal Government,' " (355 U.S. at 492), and neither the United States nor its property could be held accountable for the tax in any event. On

government property.) is more likely to result in interference with the effective use of that property, whether because of an ill-advised attempt by the tax collector to levy on the property itself or because it is sought to hold the Government or its officers to account for the tax, even if ultimately the endeavor may fail. The defense of sovereign immunity to a suit against government officers for the tax, or a suit to assert title to or recover property erroneously levied upon to satisfy a tax, may in practice be an inadequate substitute for the clear assertion of federal interest at the threshold."

the other hand in this case the school tax was not assessed "subject to prior rights of the Federal Government," and, as shown previously, *supra*, pp. 39-40, the Texas tax law undertakes to destroy exemption from state taxation any Federal property not used exclusively by the United States. Moreover, not only is there no provision in the Texas law affirmatively relieving the Federal property from a tax lien, but under the Texas ad valorem tax system the School District must assess ad valorem taxes and these taxes plainly would constitute a lien on the Federal property.

The present case further differs from *Murray Corp.* in that the City of Detroit, the taxing authority involved, was empowered under state law to assess taxes against the party in possession of the property. As the Court stated (355 U.S. at 493):

"As applied—and of course that is the way they must be judged—the taxes involved here imposed a levy on a private party possessing government property which it was using or processing in the course of its own business. *It is not disputed that Michigan law authorizes the taxation of the party in possession under such circumstances.*"

Furthermore, since the City of Detroit could be authorized to assess use taxes as such, the Court concluded that the Michigan law permitting a tax on the possessor was sufficient to support a use tax by the taxing authority despite formal verbal omissions in the statutes. The Court stated that although

" * * * the particular Michigan taxing statutes involved here do not expressly state that the person in possession is taxed 'for the privilege of using or possessing' personal property, * * * to strike down a tax on the possessor because of such verbal

omission would only prove a victory for empty formalisms * * *. In the circumstances of this case the State could obviate such grounds for invalidity by merely adding a few words to its statutes." (355 U.S. at 493)²⁶

In the present case, the Texas statutes do not empower the School District to impose taxes upon the *possessor or user* of property. *Infra*, pp. 8a-9a. Under the Texas taxing system, the tax is assessed against the owner. The School District here is without any authority whatsoever to assess use taxes. Under the Texas Constitution, the only taxes which the School District may assess and collect are ad valorem taxes. Thus, in Texas the differences between use and ad valorem taxes are not "empty formalisms" which "the State could obviate,* * * by merely adding a few words to its statutes." In Texas, before the School District could assess use taxes, the Constitution as well as the taxing statutes would have to be amended. These differences, we believe, preclude the Court from holding here, as it did in *Murray Corp.* and *American Motors*, that the taxes imposed were use taxes upon the lessee for the privilege of using or possessing Federal property.

²⁶ The same situation prevailed in the Wisconsin case which the Court affirmed in a *per curiam* opinion. *American Motors Corp. v. City of Kenosha*, 274 Wis. 315, affirmed 356 U.S. 21. The statute there provided:

"Personal property shall be assessed to the owner thereof, except that when it shall be in the charge or possession of some person other than the owner or person beneficially entitled thereto, * * * it shall be assessed to the person so in

3. The tax does not fit within the reservation in the Allegheny County case

In declining to apply *Allegheny County*, the Court in the Michigan cases pointed out that the question which it was there deciding, i.e., whether a bailee of Federal property could be taxed for his *use and possession* of that property, was expressly reserved in *Allegheny County*. See *Borg-Warner*, 335 U.S. at 471; *Murray Corp.*, 355 U.S. at 494. The School District seeks to invoke this reservation to distinguish *Allegheny County* from the instant case. According to Appellee, the present tax is an ad valorem tax upon Phillips' "right of possession and use" of the Federal property and hence is valid as within both the reservation in *Allegheny County* and the holdings in the Michigan cases (Motion pp. 18-19).

This characterization, however, is not only a contradiction in terms, but ignores the well-established differences between use and ad valorem taxes. In addition, the School District's argument overlooks the fact that this Court affirmed the taxes involved in the Michigan cases as *use* taxes, not as ad valorem taxes. Moreover, as shown, *supra*, pp. 39-40, Chapter 37 imposes the tax upon the property, not its use and possession, and in accordance therewith, the School District undertook to tax the property rather than its use. Viewed against the background of the Texas taxing structure, this case thus plainly involves "an attempt to tax the property itself by making the levy against a bailee." Such an attempt would come squarely within the holding and not the reservation in *Allegheny County*, as the School District admits in its Motion (p. 19).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that Chapter 37 of the 1950 Texas Session Laws is unconstitutional and that the judgment of the Texas Supreme Court holding to the contrary should be reversed.

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APPENDIX A

The Texas Supreme Court's attempt to nullify the settled principles for taxing lessees of non-Federal exempt property not only is untenable but, if effective, results in an even more disparate tax upon Federal lessees

The ruling of the Texas Court that the cases of *Daugherty v. Thompson*; *Taylor v. Robinson*, and *State v. Taylor* (all cited *supra* pp. 19-20)¹ together with Articles 7173 and 7174 "are no longer controlling" (R. 188) is, as the School District apparently recognizes,² plainly untenable. The asserted foundation of this holding, i.e., that "State" school lands had been made taxable in 1927 (see R. 188), is clearly insufficient support for such a sweeping conclusion.³ Article 7, Section 6a of the Texas Constitution, and Article 7150a (passed pursuant thereto) relied on by the Texas Court (R. 188) relate merely to those *agricultural* and *grazing* school lands owned by counties which were granted to them by the State (each county was given four leagues for educational purposes) and subject such lands to taxation for all but state purposes. Similarly limited is Article 7150c, also relied on below (R. 188); that

¹ The Texas Court did not, however, purport to set aside *Trammell v. Faught*, cited at *supra* pp. 17, 18.

² Far from espousing this action of the Texas Court, the School District has continued to treat at least Article 7173 and perforce Article 7174 as still fully operative. See Motion, pp. 9, 17; Brief p. 6.

³ This Court's usual rule, that it will accept as binding State court rulings on questions of State law, is not without exception. One such exception occurs when the State Court undertakes to deny a Federal right by placing its decision on plainly untenable State grounds. See, e.g., *Ward v. Board of County Comm'rs*, 253 U.S. 17, 22; *Enterprise Irrigation Dist. v. Farmers' Mutual Canal Co.*, 243 U.S. 157, 164; *Lawrence v. State Tax Commission of Mississippi*, 286 U.S. 276, 282-283.

Article concerns solely these lands owned by the University of Texas and subjects them to taxation for county purposes only.

Not only is the taxation authorized by those constitutional and statutory provisions narrow in scope, but the property thus subjected to taxation constitutes a very small segment of the vast properties, school or otherwise, owned by the State and its political subdivisions, which retain their full tax exemption. Since Articles 7173 and 7174 are provisions of general applicability and would determine the taxation of the lessees of those properties retaining their tax exemption, it is obvious that the constitutional and statutory provisions which the Texas Court invoked do not have the impact which it sought to accord them.

Likewise, the provisions relied on by the Texas Court are not broad enough to justify upsetting the cases construing Articles 7173 and 7174. While the *Daugherty* case dealt with county-owned school lands, the provisions cited by the Texas Court relate only to a portion of such lands, i.e., agricultural and grazing lands, with the other school lands owned by the counties continuing to retain their tax exemption. In addition, the provisions in no way relate to the kind of property involved in *Taylor v. Robinson* and *State v. Taylor*; the former concerned state capitol lands and the latter involved city waterworks property. In these circumstances, the constitutional and statutory amendments invoked by the Texas Court plainly could not operate to hold for naught either Articles 7173 and 7174, or the cases settling their construction.

The incongruity of the Texas Court's action is further highlighted by the facts that (1) Articles 7173,

and 7174 have been part of the Texas law since 1876; (2) the cases which the court below purported to set aside have been on the books since 1889; and (3) The Texas Legislature has reenacted in *hacce verba* the provisions of Articles 7173 and 7174 here involved in the several statutory revisions since that time.* Thus, the Legislature has, in effect, accepted the judicial construction of the statutory provisions as an appropriate gloss thereon. 39 Tex. Jur. 266, Section 141; see, also, *Missouri v. Ross*, 299 U.S. 72, 75 and cases there cited; *United States v. South Buffalo R. Co.*, 333 U.S. 771; *Aper Hosiery Co. v. Leader*, 310 U.S. 469. In these circumstances and since there is nothing in the Texas Constitution authorizing the State courts to repeal or otherwise set aside valid statutes passed by the Legislature, the Texas Court's attempt to set aside Articles 7173 and 7174, together with their settled gloss, was highly improper.

In any case, if this holding of the Texas Court were to be accepted by this Court, the result is that the tax burden imposed upon Federal lessees by Chapter 37

* The provisions of Articles 7173 and 7174 here pertinent were first enacted in Sections 23 and 24, respectively, of the Act of August 21, 1876. See General Laws of Texas, 1876, Chapter 157, Sections 23, 24. These provisions were incorporated in the Texas Revised Statutes, 1879, as Articles 4691 and 4692, respectively, and in the Texas Revised Statutes, 1895, as Articles 5087 and 5088, respectively. By the Act of March 31, 1905, (General Laws of Texas, 1905, p. 72), the Legislature amended the then Article 5087 (now Article 7173) by adding an extensive provision relating to the taxation of timber lands; that Act did not change the language of Article 5087 with which we are here concerned. The Texas Statutes were again revised in 1911 and in 1925, and the present Articles 7173 and 7174 were included in each of these revisions. See Texas Revised Statutes, 1911, Articles 7529, 7530; Texas Revised Statutes, 1925, Articles 7173, 7174.

is even more disproportionate. Articles 7173 and 7174 are the only State statutes (other than the 1950 Statute) providing for taxation of leasehold interests in tax-exempt property.⁵ If these provisions are no longer controlling, such leaseholds are now free from taxation. Therefore, the only leases of tax-exempt property which under this ruling are now subject to taxation are those of property of the United States, and the disparity in tax treatment between lessees of Federal property and lessees of non-Federal tax-exempt properties is thereby widened even more.

⁵ The School District appears to suggest (Motion p. 3) that these leaseholds would be taxable under Article 7146, which defines real property as including, in addition to land itself, "all of the rights and privileges belonging to or in anywise appertaining thereto." However, not only would this be a novel application of this Article but if so construed, the tax which could be imposed would be limited to the value of the lessee's interest. See *Bashara v. Saratoga Independent School District*, 139 Tex. 532; *Hager v. Stakes*, 116 Tex. 453, 472. In this connection, it is noteworthy that the Texas Court rejected such an argument in overruling the School District's claim for taxes which it had assessed against Phillips for the period prior to the enactment of Chapter 37.

APPENDIX B

Lessees of non-Federal exempt property do not pay an aggregate tax measured by the full value of the property

As indicated *supra*, pp. 20-21, the Texas Court apparently sought to show that the tax imposed by Chapter 37 upon Federal lessees is not in fact more onerous than the total tax paid, directly and indirectly in the form of rent, by lessees using non-Federal tax-exempt property for profit. The result thus sought to be reached is predicated on the Texas Court's statement that "all property owned by private individuals is subject to taxation when not used for a purpose covered by the exemption statutes, and is taxable for the full value of the property" (R. 187).

Even assuming that the Texas Court's statement is valid as far as it goes and accurately reflects the Texas law as far as the leasing of privately-owned exempt property is concerned,⁶ the fact remains—and even the Texas Court does not deny—that property owned by the State and its political subdivisions remains exempt even when leased for a non-exempt purpose. See, e.g., *City of Abilene v. State*, 113 S.W. 2d 631 (Tex. Civ. App.); *State v. City of Beaumont*, 161 S.W. 2d 344 (Tex. Civ. App.); *State v. City of Houston*, 140 S.W. 2d 277 (Tex. Civ. App.); *State v. City of San Antonio*, 147 Tex. 1; cf. *Daugherty v. Thompson*, 71 Tex. 194, 202. The result is that at the very least the lessees of such non-Federal exempt property are favored.

⁶ It is not clear that this is correct formulation of the Texas law on this subsidiary point. The Texas Court referred to no cases so holding and contented itself with the bare citation of certain statutory provisions. Mr. Justice Calvert in his dissent indicated that in his view, the Court had misread these statutes. See R. 202.

tax-wise, over lessees of Federal property such as is here involved.

The School District attempts to minimize the extent of the resulting uneven tax treatment by reference to a number of specific situations wherein some taxes are permitted upon property owned by the State or its agencies which would otherwise be tax-exempt (Motion pp. 8-10; Brief pp. 5-6). Despite this effort, the maximum comfort which even the School District can derive from this listing is that "*much* of the property of the State and its agencies is subjected to *at least limited taxation*" (Motion p. 10). The School District, accordingly, is forced to admit that "the tax in this case does not operate equally upon all lessees of tax exempt property." (Motion p. 8).

Moreover, examination of the seven categories listed by the School District reveals that this unequal tax treatment is in fact, not as limited as the School District would like to have it appear. We have already discussed in other connections three of the situations listed by the School District and have shown that they do not make any substantial inroads into the vast tax-exempt properties owned by the State and its political subdivisions. See *supra* pp. 16-21, 1a-2a. Of the remaining four situations, two (Categories (1) and (7))

i.e., the subjection by Article 7, Section 6a of the Texas Constitution, and Article 7150a of agricultural and grazing school lands owned by counties to taxation except for state purposes; the subjection by Article 7150c of University of Texas lands to taxation for county purposes; and the taxation of leases of exempt property for terms of three years or more.

As to the latter, we have shown in considerable detail (*supra*, pp. 16-21) that the taxation there is measured solely by the value of the leasehold estate, not by the full value of the property and that the lessee is not required to pay any tax where the lease is for less than three years.

relate to privately-owned exempt property and hence are irrelevant at this juncture. The remaining two concern State owned prison properties and State owned farms employing convict labor. These latter situations are so narrow and specialized that they, too, fall far short of indicating any widespread taxation of property owned by the State or its agencies. Consequently, despite the School District's efforts, it is plain that the overwhelming percentage of the vast properties owned by the State and its political subdivisions remain tax-exempt even when leased for a non-exempt purpose.

In addition, even the taxation to which such property is subjected in these situations is also limited. In Texas, the authority to impose taxes is divided among the State and its various political subdivisions such as cities, counties, school districts, water districts and navigation districts. The withdrawal of the exemption of specific property owned by one from taxation by another means only that the property may be taxed only by the taxing authority specifically named with the property remaining free from taxation by the others. Thus, although the University of Texas lands may be taxed for county purposes, they retain their exemption from taxation by the other political subdivisions within whose bounds they are located. Since, in contrast, the effect of Chapter 37, as construed by the Texas Court, is to subject lessees of Federal property to taxation by all taxing authorities within whose jurisdiction the property is located, it is apparent that the tax burden upon such lessees is far heavier than the total of the taxes paid, directly and indirectly in the form of the rent, by lessees of property owned by the State or its agencies even in the limited situations where the ownership interest is subject to taxation by one or more of the taxing authorities.

APPENDIX C

The Texas Ad Valorem Tax System

Article 7145, the basic provision of the Texas system, provides:

"All property, real, personal or mixed, except such as may be hereinafter expressly exempted, is subject to taxation, and the same shall be rendered and listed as herein prescribed."

All property subject to taxation which is owned or held on January 1 must be rendered for assessment between January 1 and April 30. Article 7151. The property is to be rendered by the owner or his agent; in cases of minors, insane persons, trusts, estates, and corporations, the renditions are made for the owner by others. Articles 7152, 7160.* While the rendition of property may be by some one other than the owner, Article 7171 expressly provides:

"All real property subject to taxation shall be assessed to the owners thereof in the manner herein provided; but no assessment of real property shall be considered illegal by reason of the same not being listed or assessed in the name of the owner or owners thereof."

At the time of rendition of the property, the owner is required to place a value for assessment upon each

* Article 7160, captioned "Lasting for Others", states:

"Persons required to list property on behalf of others shall list it in the same manner in which they are required to list their own, but they shall list it separately from their own, specifying in each case the name of the person, estate, company or corporation to whom it belongs."

item.⁹ If the assessor is satisfied with the valuation, he assesses the property on its list at that value. However, if he considers the value too low, he must place his own value on each item rendered and refer the matter to the local board of equalization for settlement. See Articles 7211, 7185. In addition, the assessor must by June 1 forward to the board of equalization all his lists, together with the valuation and assessment of property listed thereon. Article 7206. This board is under a duty to correct such assessments as necessary, to hold hearings and determine the proper assessments in cases of disputes and to equalize all assessments within the area subject to their jurisdiction. Articles 7206, 7211, 7212.

Taxes are payable on or after October 1 and become delinquent after the following January 1. Articles 7255, 7336. The Texas Constitution expressly provides in Article 8, Section 15:

"The annual assessment made upon landed property shall be a special lien thereon; and all property, both real and personal, belonging to any delinquent taxpayer shall be liable to seizure and sale for the payment of all taxes and penalties due by such delinquent; and such property may be sold for the payment of the taxes and penalties due by such delinquent, under such regulations as the Legislature may provide."

*When voluntary renditions are not made, the assessor is required to call upon each property owner in order to obtain a list of taxable property. Articles 7189, 7191. The assessor is further required to take the initiative and prepare a list of all property which is not rendered to him and assess it in the name of the owner or if appropriate in name "unknown". Articles 7193, 7205, 7208.

As this provision makes clear, a tax becomes a lien upon real property immediately upon its assessment. See, also, Article 7172¹⁰ and 7320. Should the taxes not be paid within six months after they become delinquent and the giving of appropriate notice to the owner, Article 7326 requires that suit be brought for judgment for the amount of the taxes and for a court order directing the sale of the property to satisfy the judgment.¹¹

Viewed in the context of these constitutional and statutory provisions, it seems plain beyond any doubt that the tax imposed by Chapter 37 was an ad valorem tax on Federal property and not one upon the privilege of using or possessing that property.

¹⁰ Article 7172 provides

"All taxes upon real property shall be a lien upon such property until the same has been paid. And should the assessor fail to assess any real estate for any one or more years, the lien shall be good for every year that he should fail to assess for; and he may, in listing property for taxes any year thereafter, assess all the back taxes due thereon, according to the provisions of this title."

¹¹ Personal property is subject to summary levy, seizure and sale for payment of taxes, but generally is not subject to a lien prior to such levy and seizure. Articles 7266, 7269.

In the Supreme Court of the United States

OCTOBER TERM, 1959

PHILLIPS CHEMICAL COMPANY, APPELLANT

v.

DUMAS INDEPENDENT SCHOOL DISTRICT

**ON APPEAL FROM THE SUPREME COURT OF THE STATE
OF TEXAS**

**BRIEF FOR THE UNITED STATES AS AMICUS
CURIAE**

J. LEE RANKIN,
Solicitor General,

CHARLES K. RICE,
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Washington 25, D. C.

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 40

PHILLIPS CHEMICAL COMPANY, APPELLANT

v.

DUMAS INDEPENDENT SCHOOL DISTRICT

*ON APPEAL FROM THE SUPREME COURT OF THE STATE
OF TEXAS*

**BRIEF FOR THE UNITED STATES AS AMICUS
CURIAE**

OPINIONS BELOW

The opinion of the Supreme Court of Texas (R. 177-203) is not yet officially reported. It is unofficially reported at 316 S. W. 2d 382. The opinion of the intermediate Texas court, the Court of Civil Appeals for the Seventh Judicial District (R. 165-170), is unofficially reported at 307 S. W. 2d 605. The District Court of Moore County wrote no opinion.

JURISDICTION

The judgment of the Supreme Court of Texas was entered on June 18, 1958. (R. 203-204.) Ap-

pellant's motion for rehearing was overruled on October 22, 1958. (R. 205.) Notice of appeal was filed on January 15, 1959. (R. 205.) Appellant's jurisdictional statement was filed on March 13, 1959 and probable jurisdiction was noted on May 18, 1959. (R. 211.) The jurisdiction of this Court rests on 28 U.S.C., Section 1257(2).

QUESTION PRESENTED

Texas assesses against those who lease property from the United States a tax measured by the value of the fee. It imposes no comparable tax upon other lessees of tax-exempt property.

The question presented is whether the taxing statute imposes an unconstitutional burden upon the United States and those with whom it deals.

STATUTES INVOLVED

The pertinent provisions of Articles 7173 and 7174, Revised Civil Statutes of Texas, Chapter 37 of Texas Session Laws (1950), and Section 6 of the Military Leasing Act of 1947, are set forth in the Appendix, *infra*, pp. 13-15.

STATEMENT

In 1948, the United States leased a Government-owned plant known as the Cactus Ordnance Works to appellant (Phillips Chemical Company) for a primary term of fifteen years. (R. 177.) The lease was entered into under the provisions of the Act of August 5, 1947, c. 493, 61 Stat. 774 (the so-called Military Leasing Act of 1947) and called for a nego-

tiated rental of about \$1,000,000 per year and the assumption by the lessee of other substantial obligations. (R. 52-77, 166-168, 178-179.) The lessor reserved the right to terminate upon 30 days' notice in the event of a national emergency and upon 90 days' notice in the event the United States wished to sell the plant. (R. 72, 167, 177.) During the period here involved, the lessee has utilized the plant to manufacture ammonia for use in commercial fertilizers. The record does not disclose that the lessee performed any supply contracts for the United States at the plant during the period here involved, nor is there anything in the record (other than the agreed rental) indicating what a private lessor could have obtained by renting similar property under like conditions.

In 1954, appellee, following the usual Texas ad valorem tax procedures, assessed taxes on the Cactus Ordnance Works against the appellant for the years 1949 to 1954 inclusive. (R. 177-178.) Phillips thereupon brought this action in the state courts for an injunction against the assessment and collection of the tax. (R. 177-178.) It alleged that the plant was fully owned by the United States and was therefore immune from state and local taxation, and that the taxation of the plant at its full value to Phillips violated the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States. (R. 179.)

Following decisions adverse to Phillips in the lower state courts, the Supreme Court of Texas, on writ of error, upheld the tax as applied. Three justices

dissented on the ground that the statute unconstitutionally discriminated against the United States and its lessees. (R. 191-203.) On appellant's motion for rehearing, which the Supreme Court of Texas denied (R. 205), an additional justice joined those previously dissenting (R. 194). This appeal followed.

ARGUMENT

The Texas Statute As Here Applied Is Unconstitutional In That It Unlawfully Discriminates Against Lessees of the United States

Problems involving the principle of inter-governmental (*i.e.*, federal-state) tax immunity were recently considered by this Court in *United States v. City of Detroit*, 355 U.S. 466, *United States v. Township of Muskegon*, 355 U.S. 484, and *City of Detroit v. Murray Corp.*, 355 U.S. 489, rehearing denied, 357 U.S. 913. Relying on these decisions, the courts below have upheld the statute here involved—a statute which is in terms directed exclusively to taxation of lessees of the United States. In our view, this reliance is wholly misplaced, for those decisions were rested upon the conclusion that the state taxing statutes involved were non-discriminatory. As we shall show, under Texas law lessees of other exempt property (*e.g.*, property owned by the state or by a charitable organization) would not be taxable at all when holding under a lease terminable (as here) on short notice. And lessees of such property holding under a long-term (three years or more) lease are taxable only upon the value of their leaseholds, not (as here).

upon the value of the entire fee. We believe accordingly that there is no escape from the conclusion that this taxing scheme is a discriminatory one repugnant to the Constitution of the United States.

A. State taxing statutes may not discriminate against those who deal with the United States

In *United States v. City of Detroit*, *supra*, this Court restated the basic principle, dating from *McCulloch v. Maryland*, 4 Wheat. 316, that the several states may not use their taxing power to discriminate against the Federal Government or those with whom it deals, declaring (355 U.S. at 473):

It still remains true, as it has from the beginning, that a tax may be invalid even though it does not fall directly on the United States if it operates so as to discriminate against the Government or those with whom it deals.

See also *City of Detroit v. Murray Corp.*, *supra*, 355 U.S. at 494. Consistent with this principle, the Court, in each case, has examined the state tax sought to be imposed to determine whether it in fact discriminated against the United States or its contractors, and it has sustained the taxing scheme only when satisfied that no such discrimination resulted. *Helvering v. Gerhardt*, 304 U.S. 405, 413, 420; *Miller v. Milwaukee*, 272 U.S. 713; *McTealf & Eddy v.*

* It is assumed for purposes of this brief (although we believe the appellant's brief correctly demonstrates the contrary (pp. 36-50)) that the statute involved (Chapter 37 of the Texas Session Laws (1950), Appendix, *infra*, pp. 13-15) imposes a tax upon privileges held by federal lessees rather than a tax upon the federal property.

Mitchell, 269 U.S. 514. See also *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 480, 487; *Alabama v. King & Boorer*, 314 U.S. 1, 8; *Oklahoma Tax Commission v. Texas Co.*, 336 U.S. 312, 361-362.

The court below appears to have read *United States v. City of Detroit* and companion cases, as sustaining all taxes asserted against lessees of property owned by the United States. (R. 183-185.) It has overlooked this Court's conclusions that the state tax involved in *City of Detroit* did not on its face discriminate against federal lessees and that it was not discriminatorily administered. That tax, this Court observed (355 U.S. at 473), applied "to every private party who uses exempt property in Michigan in connection with a business conducted for private gain." The Court found no "showing that the tax is in fact administered to discriminate against those using federal property. To the contrary undisputed evidence introduced by appellees demonstrates that lessees of other exempt property have also been taxed" (*id.*, p. 474).

The Texas statute here involved "is in fact administered to discriminate against those using federal property." This discrimination, as we point out in the two succeeding sections of this brief (*infra*, pp. 6-9), has two aspects.

B. Under Texas law, a non-federal lessee similarly situated is not subject to any tax

The authority for the taxation of non-federal lessees² is found in Article 7173, 20 Vernon's Texas

²We use the term "non-federal lessee" as a shorthand expression to indicate that the lease involves exempt property which is not federally owned.

Revised Civil Statutes. (Appendix, *infra*, p. 13.) That Article states that property "held under a lease for a term of three years or more" which belongs to the State or is exempt by law from taxation shall be considered for tax purposes "as the property of the person so holding the same". In applying this statute, the Supreme Court of Texas has held that leases which run for more than three years, but are terminable at the option of the lessor upon short notice, do not constitute leases for "three years or more" within the purview of the statute. *Trammell v. Faught*, 74 Tex. 557. That case involved leases of state lands for periods in excess of three years, but the leases provided that the State as lessor could terminate at any time in the event of a sale of the lands. It was held that the leases were conditional only, since they could be terminated at the will of the State as lessor, and that hence they could not be deemed to constitute leases "for a term of three years or more". There is no indication that this case, decided in 1889, does not continue to represent the law of Texas. The courts below have not questioned its authority.

Under the standards set forth in *Trammell v. Faught*, *supra*, the lease to appellant must likewise be considered conditional, rather than a lease for "three years or more". The lease reserves to the United States, as lessor, an option to terminate at any time upon not less than ninety days' notice in order to permit the sale of the leased property, and it extends an additional option to the United States to terminate the lease at any time upon thirty days'

notice in the event of a declaration of a national emergency by the President or by the Congress. (R. 72.) Under Article 7173, as applied by the Texas courts, no tax whatever would be imposed if the property subject to such a lease were state-owned. Nonetheless, the court below has sustained the taxes imposed on appellant under Chapter 37 of Texas Session Laws (1950) (Appendix, *infra*, pp. 13-15), which provides for the taxation of lands of the United States used by a private person, firm, or corporation in its private capacity or used and occupied in the conduct of any private business or enterprise.

It is thus clear that in Texas there are two rules of law and that the determining factor as to which one controls is whether the United States is the lessor. A lessee under a short-term or a conditional lease is free from tax if he leases from the State or its instrumentalities or from a private charity. But he is subject to tax if he leases from the United States. To single out lessees of federal property in this fashion is plainly a forbidden discrimination.

C. Under Texas law, a non-federal lessee is taxable at most upon the value of his leasehold, not upon the value of the fee

Even if appellant's lease could be deemed a lease for three years or more within the meaning of Article 7173 (a conclusion which we believe foreclosed by *Trammell v. Faught*, *supra*), discrimination nonetheless results since the measure of the tax is substantially greater merely by virtue of the fact that the United States is the lessor. The tax here im-

posed is measured by the full value of the leased property. (R. 181.) Non-federal lessees, however, would come within the purview of Article 7174, 20 Vernon's Texas Revised Civil Statutes (Appendix, *infra*, p. 13) which provides that leaseholds shall be taxed "at such a price as they would bring at a fair voluntary sale for cash"—in other words, on the value of the leasehold interest as such.

It had long been held by the Supreme Court of Texas that the predecessors of Article 7174 did not permit the taxation of lessees of exempt lands for the full value of the leased property, but authorized only a tax based upon the value of the leasehold. *Daugherty v. Thompson*, 71 Tex. 192; *State v. Taylor & Kelley*, 72 Tex. 297; *Taylor v. Robinson*, 72 Tex. 364; *Trammell v. Faught*, *supra*. As to lessees of federal property, however, Chapter 37 of the 1950 Texas Session Laws, as interpreted by the court below, requires a tax measured by the full value of the fee.

The opinion below suggests (R. 188) that Articles 7173 and 7174 are no longer operative. But if this be so, the discrimination against the lessees of federal property, far from being removed, becomes even more apparent. If Articles 7173 and 7174 are to be read out of existence, there is no statutory provision whatever authorizing the taxation of non-federal lessees. In that event, federal lessees would remain subject to tax on the full value of the fee, pursuant to the provisions of Chapter 37, while lessees of other exempt property would be subject to no tax whatever, irrespective of the duration of their leases.

D. *Nothing contained in the Military Leasing Act of 1947 authorizes a discrimination against lessees of federal property*

Section 6 of the so-called Military Leasing Act of 1947 (Act of August 5, 1947, c. 193, 61 Stat. 41) (Appendix, *infra*, p. 15) provides that the interest of a lessee created pursuant to the provisions of that Act shall be subject to state or local taxation. Congress intended, to be sure, that lessees whose interests arise by virtue of the provisions of that Act shall not be exempt from state or local taxation, but could bear their fair share of local tax burdens. But it is obvious, without further elaboration, that this cannot be transformed into a consent that they shall be subject to unconstitutional discriminatory taxation.

E. *The discrimination cannot be justified*

Appellee, not directly denying the existence of the discrimination, seeks to justify and to minimize it. In the brief which it filed in this Court in support of its Motion to Dismiss, it urged (pp. 6-7) that a state should be permitted to protect "itself and its creatures from taxation without at the same time protecting the creatures of another sovereign." It appears to claim a right to place a substantial tax upon federal lessees without placing any similar tax upon the lessees of a State or of its political subdivisions. But under the principles only recently stated by this Court in *United States v. City of Detroit*, *supra*, the mere fact that lessees of a state and its subdivisions are not taxed, while lessees of

the United States are, involves an invidious discrimination requiring invalidation of the tax.

Appellee also urges (*id.*, p. 7) that "only the federal government is the owner of large industrial plants available for lease to private businesses." Be this as it may, there can be no denying that the State and its subdivisions and private charities regularly lease valuable properties to private persons. Indeed, to the extent that the present tax is directed at large industrial plants owned by the United States for defense purposes, the constitutional infirmity of

The program under which the plant here involved was leased was an integral part of a plan under which defense plants were to be kept in working condition so as to be available in the event of a national emergency. As the court below stated (R. 178-179):

After the end of World War II the United States Government had on hand a number of plants which it had constructed for the production of material and supplies needed to effectually wage that war. In order to keep these plants and equipment in working condition and available to the Government in case of another emergency it was decided, after careful study, to sell some of the plants to private operators with a "recapture" clause for the plants to be returned to the Government for a consideration and to be operated by the purchaser solely under Government direction and control for the exclusive use of the Government in the event of another war or the declaration of an emergency. Certain other plants and equipment, which included "Cactus Ordnance Works" were to be leased by the Government to private operators with like provisions for Government control and operation in the event of another war or existence of an emergency; also provision was made in the leases authorizing the delivery of possession to the purchaser in the event the Government exercised its option to sell.

It may be noted that this lease was executed on July 22,

the statute is highlighted. The vital principle to which this Court has consistently adhered is that the functions of the Federal Government shall not be impaired, either directly or indirectly, by the imposition of discriminatory tax burdens.

CONCLUSION.

Chapter 37 of the 1950 Session Laws of Texas, as here applied, unlawfully discriminates against the United States, its lessees and others with whom it deals. It is therefore repugnant to the Constitution of the United States. The judgment should be reversed.

Respectfully submitted,

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SEPTEMBER, 1959.

1948 (R. 77), and that a further national emergency occasioned by events in Korea was proclaimed by the President on December 16, 1950. Proclamation No. 2914, 61 Stat. A151.

APPENDIX

20 Vernon's Texas Revised Civil Statutes:

Art. 7173. *Leasehold interests in public lands.*

Property held under a lease for a term of three years or more, or held under a contract for the purchase thereof, belonging to this State, or that is exempt by law from taxation in the hands of the owner thereof, shall be considered for all the purposes of taxation, as the property of the person so holding the same, except as otherwise specially provided by law.

Art. 7174. *Valuation of property for taxation.*

* * * *

Taxable leasehold estates shall be valued at such a price as they would bring at a fair voluntary sale for cash.

* * * *

Texas Session Laws (1950), Fifty-First Legislature,
First Called Session, c. 37:

An Act to amend Article 5248, Revised Civil Statutes of Texas, 1925, relative to the exemption of lands and improvements owned by the United States of America from taxation, so as to provide that all personal property located on said lands owned by private parties and all parts of said lands and improvements used and occupied by private parties shall be subject to taxation; providing a saving clause; repealing all laws and parts of laws in conflict; and declaring an emergency.

Be it enacted by the Legislature of the State of Texas:

Section 1. That Article 5248 of the Revised Civil Statutes of Texas, 1925, is hereby amended so as to hereafter read as follows:

"Article 5248.

The United States shall be secure in their possession and enjoyment of all lands acquired under the provisions of this title; and such lands and all improvements thereon shall be exempt from any taxation under the authority of this State so long as the same are held, owned, used and occupied by the United States for the purposes expressed in this title and not otherwise; provided, however, that any personal property located on said lands, which is privately owned by any person, firm, association of persons or corporation shall be subject to taxation by this State and its political subdivisions; and provided, further, that any portion of said lands and improvements which is used and occupied by any person, firm, association of persons or corporation in its private capacity, or which is being used or occupied in the conduct of any private business or enterprise, shall be subject to taxation by this State and its political subdivisions."

Sec. 2. In the event that any section, subsection, paragraph, sentence, clause, phrase or wording of this Act shall be held invalid or inoperative, such holding shall not affect the validity of the remaining portions of this Act, and the Legislature hereby declares that it would have enacted such remaining portions despite such invalidity.

Sec. 3. All laws and parts of laws in conflict herewith are hereby repealed to the extent of such conflict.

Sec. 4. The fact that there is no adequate provision in the Statutes of this State providing for ~~taxation of personal property located on~~ lands belonging to the United States which are privately owned by persons, firms, associations of persons and corporations, and lands and improvements, although owned by the United States of America, which are used and occupied in the conduct of private businesses and enterprises by persons, firms, associations of persons and corporations, and the further fact that the funds being lost by reason of these properties escaping taxation are badly needed by the State and its political subdivisions create an emergency and an imperative public necessity that the Constitutional Rule requiring bills to be read on three several days in each House be suspended, and said Rule is hereby suspended, and this Act shall take effect and be in force from and after its passage, and it is so enacted.

Act of August 5, 1947, c. 193, 61 Stat. 774 (The Military Leasing Act of 1947).

SEC. 6. The lessee's interest, made or created pursuant to the provisions of this Act, shall be made subject to State or local taxation. Any lease of property authorized under the provisions of this Act shall contain a provision that if and to the extent that such property is made taxable by State and local governments by Act of Congress, by such event the terms of the lease shall be renegotiated.

634 U.S.C. 1952, c. 8, § 322 (a).

FILED
OCT 14 1959

JAMES H. BROWNING, Clerk

In the
Supreme Court of the United States
OCTOBER TERM, 1959

No. 40

PHILLIPS CHEMICAL COMPANY, a Corporation,
Appellant,

DUMAS INDEPENDENT SCHOOL DISTRICT,
Appellee.

On Appeal from the Supreme Court of the State of Texas

BRIEF FOR APPELLEE

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October 15, 1959.

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In the
Supreme Court of the United States
OCTOBER TERM, 1959

No. 40

PHILLIPS CHEMICAL COMPANY, a Corporation,
Appellant,

DUMAS INDEPENDENT SCHOOL DISTRICT,
Appellee.

On Appeal from the Supreme Court of the State of Texas

BRIEF FOR APPELLEE

STATEMENT

The statement of the case made by Appellant in its brief (pp. 5-7) is a fairly accurate and complete statement of the nature and results of this suit in the Courts below. In one important respect, however, Appellee disagrees with the manner in which Appellant has stated the case, and therefore presents this additional statement.

It is true that the underlying property involved in this case is a government facility in Moore County, Texas.

known as Cactus Ordnance Works. It is not true, however, that Appellee "undertook to tax the Ordnance Works to Phillips for the years 1949 to 1954, inclusive," or that the local assessor "placed the Ordnance Works upon the tax rolls in the name of Phillips Chemical Company as the owner of the property" (Brief, p. 6). Rather, what the school district undertook to tax to Phillips for such years, and what it placed upon the tax rolls for such years, was the interest that Phillips, as lessee, owned in and to such underlying property. The tax was laid upon such interest as Phillips had, its right to use and possession of the premises, arising out of its lease from the United States.

It is imperative that this crucial point be understood from the beginning, because much of the argument in Appellant's brief is based upon the proposition that the taxes involved were laid upon the property of the United States, rather than upon some private property interest owned by Appellant. It is true that in the trial, and in the proceedings leading up to the trial, not every reference to the "property" involved was crystal-clear on this point. But, regardless of any failure to specify with particularity, each and every time that some reference was made to the property, that only the lessee's interest therein was intended to be referred to, it is abundantly clear from the record that there was never any misconception on the part of either party hereto as to what property interest was intended to be taxed. For example, Appellant's Division Tax Manager testified at the trial, and he admitted that he knew, at all relevant times, that the school district was not

attempting to assess for taxes anything other than the interest of Appellant in the property. (R. 149.) Appellee's pleadings were clear and specific to the effect "that the property on which the taxes were assessed and levied, as herein set forth, is the leasehold interest of the Plaintiff in that property known as the Cactus Ordnance Works, fee title to which is in the United States." (R. 22.)

Further, while Appellee may differ with the manner in which Appellant has stated, in a single sentence each, the judgment and the holding of the Trial Court and of the Supreme Court of Texas, Appellee will not attempt to correct such statement, but will let the judgment and opinion of these Courts speak for themselves.

SUMMARY OF ARGUMENT

I.

A. Although the Texas Statute (*Acts 1950, 51st Leg., 1st C.S., p. 105, ch. 37, § 1; Article 5248, Revised Civil Statutes of Texas*) purports by its terms to apply only to users and occupiers of federal property for profit, and does not apply to "lessees" of other types of exempt property, it does not necessarily follow that the statute unconstitutionally discriminates against federal "lessees." The statute must be considered in its proper place as a part of the Texas tax laws as an integrated whole, and the tax position of Appellant must be considered with relation to the tax picture of users and occupiers for profit of other tax-exempt property in the State.

B. *Article 5248* is not a statute that taxes leaseholds in exempt property as such, and is not to be compared to *Article 7173, Revised Civil Statutes of Texas*, which would have been sufficient in itself to lay a tax on leaseholds in federal property, as well as in other exempt property. Rather, it is a statute designed to equate the tax burden of a user or occupier for profit of federal property with the tax burden carried by other businesses that compete with them but that use property subject to taxation, either because such property is not exempt from taxation at all or because it loses its exemption when used for profit. In the case of non-federal exempt property, the exemption is taken away, as it was given, by the legislature, when the property is used for profit; but the legislature can not take away the "immunity" of the federal property and it can equate the tax burdens of users and occupiers of exempt property only by taxing the property right of use and occupancy in those properties that it can not tax directly. Appellant has not shown in this case that any business in Texas that conducts its business in property that is normally tax-exempt, fails to pay taxes, either directly or indirectly, to the same extent that Appellant is here called upon to pay them.

C. Non-federal property that is exempt from taxation under Texas law normally loses its exemption from taxation when not owned and used exclusively for the exempt purpose, so that users and occupiers of such property normally pay taxes on it through a tax-paying landlord, if not directly. Since this is not true of federal property, it

was within the bounds of permissible classification for tax purposes for the legislature to erect a class of users and occupiers of federal property for profit, and to authorize the taxation of members of this class on their property right of use and occupancy of the federal property.

D. Congress has specifically consented to the taxation of the "lessee's interest" in the property here in question, and the enabling act by means of which the State accepts this invitation to tax should not be deemed discriminatory legislation. Congressional consent has removed from this case any question of "federal immunity" from taxation, leaving only the question of whether or not Appellant should be made to bear the same tax burdens borne by its competitors in the business community.

II.

A. Although the tax here in question may be an ad valorem tax, rather than a privilege or use tax, it does not follow that it is, *a fortiori*, an *invalid* ad valorem tax under the authority of *United States v. Allegheny County*, 322 U. S. 174 (1944). The tax is laid, not upon the federal property itself, but upon a private property right, the right of use and occupancy for profit. This right of use and occupancy, under Texas law, is a valuable property right, and is taxable as any other property. There is no logical distinction between a *privilege* of use and possession and a *property right* of use and possession, and both are equally subject to taxation.

B. The property right of use and occupancy is taxable under Texas law. A group of Texas cases, decided some seventy years ago and here relied upon by Appellant, do not hold to the contrary. To the limited extent of any remaining validity of these cases, as analyzed and construed by the Supreme Court of Texas in this case, they are not in point here. The controlling feature of this case is the 1950 statute, not the 1888 decisions.

C. The tax here in question is not discriminatory when viewed as a tax upon the private property right of use and occupancy of exempt property. The "privilege taxes" approved by this Court in the "Michigan cases," *United States and Borg-Warner Corporation v. City of Detroit*, 355 U. S. 466 (1958); *United States v. Township of Muskegon*, 355 U. S. 484 (1958), and *City of Detroit v. Murray Corporation of America*, 355 U. S. 489 (1958), are no more universal in application within the bounds of permitted classification, nor more even-handed or non-discriminatory, than the taxes in issue in this case.

D. The "Immunity Doctrine" is not applicable in this case, because the tax is not laid on a property interest of the United States. Regardless of the deviations that have occurred through the years, the doctrine of *McCulloch v. Maryland*, 4 Wheat. 316 (1819), as now and in more recent years applied by this Court, will not be extended to exempt from taxation by the States the private interests of those who deal with the United States, or obtain their rights, privileges, or property interests by contract with the United States.

ARGUMENT

I.

THE TAX DOES NOT DISCRIMINATE UNCONSTITUTIONALLY AGAINST THE UNITED STATES AND ITS LESSEES

A. Chapter 37 Is Not Invalid as Special Legislation Directed Solely Against Federal Lessees

It is not denied by Appellee that *Section 1, Chapter 37, 1950 Texas Session Laws* (amending *Article 5248, Revised Civil Statutes of Texas*, and hereinafter referred to as *Article 5248*) is a statute directed at users and occupiers of federally-owned, tax-exempt property. It is admitted that the purpose of this legislation was to provide a method whereby taxes could be assessed against persons and entities using and occupying property that is exempt from taxation in and of itself, in the hands of the federal government as owner. It is true that the statute does not apply to the users and occupiers of any other type of tax-exempt property. All of these matters are self-evident from the terms of the statute itself.

However, it does not necessarily follow that, for these reasons, the statute is invalid and unconstitutional. No state statute stands by itself. Most statutes have a limited application to some specific object. In determining the validity of a statute, it must be viewed in the light of the over-all statutory scheme of which it is a part. *Atlantic Coast Line Railroad Co. v. Phillips*, 332 U. S. 168, 179 (1947).

This is particularly true of taxing statutes. Almost any such statute would appear to be discriminatory if viewed alone, because by placing a tax upon one object only, and failing to levy a tax upon anything else, it would appear to be placing the entire burden of taxation upon such object. It is only where a taxation statute, viewed with relationship to other parts of the scheme of taxation, is then shown to be discriminatory, beyond the permissible bounds of classification, that a taxing statute should be declared invalid. *Tradesmens National Bank of Oklahoma City v. Oklahoma Tax Commission*, 309 U. S. 560, 568 (1940). Such a test of validity must be considered implicit in all decisions of this or any other court where the validity of a tax statute was called into question.

Appellee believes that *Article 5248*, when viewed in its proper place in the Texas taxing system, is not unconstitutionally discriminatory, even though it applies, by its terms, only to users and occupiers of federal property for profit. Appellant cites *Miller v. Milwaukee*, 272 U. S. 713 (1927), for the proposition that a state taxing statute that is directed specifically at the federal government is, *a fortiori*, unconstitutional and void. Appellant obviously misconstrues the holding of *Miller v. Milwaukee*, which case would be in point here only if no other exempt property used and occupied in a private capacity for profit were taxable under the Texas taxing system. See *Pacific Computing v. Johnson*, 285 U. S. 480 (1932).

Again and again, throughout its Brief, Appellant poses the question before this court in such a way as to attempt

to avoid the genuine issues in question. For example, near the bottom of page 13 of its brief, Appellant states that the "Texas taxing system leaves no room for the argument that the purpose of Chapter 37 was solely to place federal lessees on a parity, tax-wise, with lessees of other exempt property." Appellant thus attempts to restrict the consideration of the classification erected by the Texas legislature in this area of taxation by considering one class to be composed of potential tax payers who are lessees of federal property, and another class of potential tax payers who are lessees of other exempt property. Appellant hammers away at this throughout the brief: over here are the lessees of federal property, and over there are the lessees of other exempt property. Never does Appellant concede that this matter may be thought of in the light of two classes, one composed of business enterprises, with a profit motive, using, occupying, and operating their businesses in properties that are owned by the federal government, and upon which no taxes are paid, either directly or indirectly, nor by way of increased rent to a tax-paying landlord, and the other group composed of similar business enterprises who either own their own properties, and pay taxes thereon, or who rent from landlords who must pay taxes on the property, and pass along the cost thereof in the way of increased rent.

In the various parts of its argument, Appellant seems to go so far as to indicate that if any tax-exempt property other than federal is leased, and the lessee is not taxed in the same way and to the same extent that Appellee is

attempting to tax Appellant here, then that it necessarily follows that this tax is invalid.

This argument is not sound because it must be recognized that there is a practical problem that faces a legislature in attempting to find a means to impose permissible taxes upon those who deal with the federal government. It is a simple matter for the legislature to provide, for example, that the property of the Boy Scouts of America is exempt from taxation, unless it is leased or used for profit, in which event it becomes fully taxable. This same direct approach cannot be used with respect to federal property, because the exemption from taxation of such property is not granted by the state legislature, and the state legislature cannot take it away. Yet, if the property of the Boy Scouts is leased, used, or occupied with a view to profit, the property should be subject to taxation, and of course the tax will eventually, if not directly, be paid by the person who so uses it for profit. The exemption is taken away, and the legislature can impose the tax upon either the owner or the user of the property, knowing that the user will eventually bear the economic burden of the tax. In the case of federal property, however, even though the legislature may feel that the user should pay taxes to the same extent as the user of the Boy Scout property, a different method of imposing the tax upon him must be found. The State legislature has no right or power to impose a tax directly upon the federal government, expecting the government to pass the economic burden along to the user for profit. Yet, if the user and occupier of one

property should be subject to taxation, why should not the user and occupier of the other property pay a similar tax?

Thus, the entire problem may be viewed in this light. If the tax is one which could be imposed, and which probably would be imposed, if the taxpayer were dealing with someone other than the federal government, then the tax should not be deemed invalid merely by virtue of the fact that it is imposed when such taxpayer is in fact dealing with the government. The immunity of the federal government should not be used to defeat the right of a State to impose taxes on a private business, commensurate with taxes being imposed upon competitors of such private business, merely because the business in question is a lessee of the federal government. A State should not be deprived, under the guise of federal immunity, from levying every tax upon a business that would be levied upon other comparable businesses, merely because one conducts its business in a property that is owned by the federal government, and the others conduct their businesses in properties otherwise owned.

Again, it should be kept in mind that not even the incidence of the tax is the controlling factor in determining the question of the validity of the statute here. Appellant attempts, in stating its case, to restrict the question to a comparison of the tax placed upon a lessee of federal property with that placed upon a lessee of other exempt properties. Such a narrow posing of the problem is not realistic. In one case there may be a tax upon a lessee, or a user or occupier, of exempt property, whereas in another case the

property itself may lose its exemption, but the real result is the same in either case, if in fact the exemption is taken away when property otherwise exempt from taxation is used with a view to profit.

B. Chapter 37 Does Not Illegally Discriminate Against Users and Occupiers of Federal Property

It is apparent, of course, that Appellee believes that the Michigan cases decided by this Court in the 1957 term support the validity of the Texas tax at issue in this case. *United States and Borg-Warner Corporation v. City of Detroit*, 355 U. S. 466 (1958); *United States v. Township of Muskegon*, 355 U. S. 484 (1958; and *City of Detroit v. Murray Corporation of America*, 355 U. S. 489 (1958). Appellant argues, on the other hand, that the taxing system of Michigan is so different from that of Texas that these cases actually require a holding in this case that the Texas tax is unconstitutionally discriminatory (Brief 15). This argument is based upon the proposition that the Texas statute, *Article 5248, Revised Civil Statutes of Texas*, purports to lay a tax upon lessees of federal property which is different from and less burdensome than the tax laid upon lessees of other tax-exempt property. Thus, again is seen Appellant's insistence that the classification involved is of the two types of lessees, and its refusal to face the fact that Appellant is classified here for tax purposes as a user and occupier of property for profit of a valuable commercial property, whose business competitors that own their own property or rent from private landlords pay taxes,

either directly or indirectly, on the property that they use and occupy. Neither the legislature nor the Courts of Texas have attempted to equate the tax provided in *Article 5248* with the tax on certain lessees of exempt property provided for in *Article 7174, Revised Civil Statutes of Texas*, but Appellant persists in attempting to show that such an equality would be the only validly applicable purpose of the statute.

Article 5248 recognizes, for tax purposes, the valuable property right that a private entity has when it has the right of use and occupancy of a property for profit. As is shown in the Appendix to this Brief, in almost every circumstance where tax-exempt property, other than federal, is used in Texas with a view to profit, the tax exemption is lost. Further in those cases where federal property is not involved, it is a simple matter for the State to enforce this deprivation of exempt status; it can be done by direct legislative action, or it may result simply from the judicial enforcement of constitutional or statutory provisions. Such simple and direct method is not available, however, in the case of federal property that is being used and occupied for profit. In the absence of congressional consent, the State may not impose a direct tax upon federal property, even though such property is being used and occupied for private purposes. Since the economic incidence of a property tax is almost always on the user or occupier of the property, either in the form of direct payment or in the form of increased rent, and since the user or occupier will thus pay the tax whether it does so directly, as under the

present statute, or indirectly in the event the tax is levied directly against the property, it seems not unreasonable to argue that a tax should not be deemed invalid merely because it is levied directly against the user and occupier, and levied directly on his right to use and occupancy as a valuable property right. If the tax thus levied upon him serves to place him in a more equable position with others of the community using property for their own private use and benefit, no invalidity should be read into the taxing statute merely because, procedurally and technically, the tax payer is in a different position from that of other users or occupiers of property for profit.

When viewed in the light of actual results accomplished by the statute now under attack by the Appellant, it is seen that the Appellant actually is complaining because the State has chosen not to allow Appellant to remain in the most favored group of potential tax payers but has chosen to place it in the same position, tax-wise, as the vast majority of its competitors. It might be said that the crux of Appellant's argument is that if a single example can be found of a lessee, or user and occupier, of property otherwise exempt from taxation, who does not pay the same tax that Appellant is required to pay under the present statute, then such statute is invalid, regardless of the fact that on the other side, many tax payers can be pointed out who do pay the same tax that Appellant will be required to pay if this statute is upheld. This argument has been rejected by this Court, *Tradesmen's National Bank of Oklahoma City v. Oklahoma Tax Commission*, 309 U. S. 560, 568 (1940).

As is clearly shown by the examples and authorities set forth in the Appendix to this Brief, the exemption from taxation in Texas is closely restricted and strictly construed. Except for the exemption for government property, national, state, and local, property is not exempt from taxation unless it is held and used either for public purposes, educational purposes, religious purposes, or for purposes for purely public charity, *Section 2, Article VIII, Constitution of Texas*. When property is not held and used for such exempt purposes, then within the limits of the State's power to do so, the exemption is taken away. Even the property of State and local governments loses its exemption when it is not owned and held for public purposes, *City of Abilene v. State*, 174 S. W. 2d 621 (Tex. Civ. App. 1947), error dismissed.

Since the law as it was in Texas before the amendment to *Article 52* already provided for the loss of the exemption in the case of private use of all property except federal property, it was not arbitrarily discriminatory for *Article 52* to apply only to federal property. The enactment of this statute was plainly an attempt, within the scope of the permission granted by Congress, *Act of August 5, 1947, ch. 494, 61 Stat. 721*, to bring the tax position of users and occupiers of federal property into a position of equality with the users and occupiers of other property generally exempt from taxation when held, owned and used by its owners, *Pacific Company v. Johnson*, 285 U. S. 480 (1932); *Tradesmen's National Bank of Oklahoma City v. Oklahoma Tax Commission*, 309 U. S. 560 (1940).

Appellant makes a point of the fact that Appellee can cite no cases where a temporary use and occupancy for profit of State or local property resulted in the loss of the tax exemption. Appellant apparently believes that this indicates that the State has one rule for federal property and another and different rule for its own property, and the property of its political subdivisions. Actually, this does not necessarily follow, because Appellant cannot cite any situation where State or local government property in the State of Texas creates a condition like that presented in this case. If the State of Texas, or any of its political subdivisions, own or hold any property designed and built for commercial purposes, and now used or occupied by any private person or entity for profit, then the Appellant has wholly failed to show what it is. The most that Appellant can show, from any decided case in this jurisdiction, is that from time to time, a governmental subdivision may hold some property for public purposes, and pending the actual development of the property for the intended use, there may be a temporary leasing of the same. For example, see *City of Abilene v. State*, 113 S. W. 2d 331 (Tex. Civ. App. 1937), *error dismissed*. Such interim leasing is a far cry, however, from the situation that is presented by the billions of dollars' worth of prime industrial property,

The State Board of the Natural Resources of Texas, *et al. v. American Telephone and Telegraph Company*, 141 F. 2d 1001 (5th Cir. 1944), *cert. denied*, 323 U. S. 781 (1945). In that case, the Federal Government had entered into a lease with a local telephone company for the use of a local telephone exchange.

The Government has estimated that the Department of Defense alone controls \$10,000,000,000 worth of industrial plants, in the hands of private contractors. *Political Bureau of the Communist Party, U. S. A. v. National Student Reliance Council of the United States*, 104 F. 2d 1001 (5th Cir. 1944).

owned by the United States government, and dedicated to private commercial use through leases such as that involved in this case. Property of this kind was originally acquired or constructed, in most cases, for a purpose usually deemed commercial rather than governmental in our American politico-economic system, the manufacture of the implements of war. Because private industry could not meet the emergency demands of war, the government found itself a landlord of commercial property on a large scale. There is no showing in this case that the Texas statute would apply to any other type of leased federal property than these commercial manufactories, or that the government has any other type of property available for use or occupancy by a private person or in the conduct of a private business.

At every stage of the proceedings in this case, Appellant has had ample opportunity to show where any comparable situation exists, with regard to any exempt property other than federal, but it has not done so and can not do so. At page 29 of its Brief, Appellant states that "although Texas and its political subdivisions may not own industrial plants reserved for national defense, the State and its agencies do own and lease properties of even greater value." Then, presumably because it is the only example, Appellant cites as "the most outstanding example of such properties," the "extremely rich and prolific oil and gas lands of Texas and its subdivisions" which, it is stated, are periodically "leased" for millions of dollars to private corporations. It is surprising that such a statement should be found in a

brief filed by oil company lawyers. It is well-known that the Texas oil and gas "lease" is not a lease at all, but is a conveyance of oil and gas in place as an interest in real property. *Texas Company v. Daugherty*, 107 Tex. 234, 176 S. W. 717 (1915); *Stephens County v. Mid-Kansas Oil & Gas Co.*, 113 Tex. 160, 254 S. W. 290 (1923). These same cases hold that the real property interests of the lessees under oil and gas "leases" are taxable to the lessees just as any other real property is taxed. Naturally, if leases from the State or its political subdivisions carried with them an exemption from taxation on the lessee's interest, such leases would be much more valuable, and would bring a higher price in the market than leases from private individuals, but the State of Texas has never contended that the interests of the lessees are not subject to taxation. *Greene v. Robison*, 117 Tex. 516, 8 S. W. 2d 655 (1928).

This position, which was adopted from the beginning in Texas, contrasts sharply with the earlier position of this Court on the state taxation of the interests of a lessee in federal land. *Indian Territory Illuminating Oil Company v. State of Oklahoma*, 240 U. S. 522 (1916); *Gillespie v. State of Oklahoma*, 257 U. S. 501 (1922). These cases held that a tax upon the leases is a tax upon the power to make them, and could be used to destroy the power to make them. In other words, the government might be able to bargain for higher royalties if its lessee were free from a net income tax which lessees of private land must pay, or if such lessees were free from property taxes which the lessees of private lands must pay. These earlier cases have, of

course, now been overruled by this Court, and the immunity of a lessor is not now held to extend to his lessee, in the case of oil and gas leases, *Hedberg v. Mountain Producers Corporation*, 303 U. S. 376 (1938); *Oklahoma Tax Commission v. Texas Company*, 336 U. S. 342 (1949).

The Appellant points out that the Michigan statute validated by this Court in 1958, by its terms applied to lessees of federal property and also to lessees of all other tax-exempt property, and that this point was relied upon by this Court in approving the statute. Appellant then reasons that because the Texas statute does not, by its terms, apply to lessees of all tax-exempt property, that the Texas statute is necessarily discriminatory. Viewed simply within the framework of the rules of syllogistic reasoning, the conclusion is fallacious. The major premise stated is not a *sine qua non* of equitable taxation, because the essential equality of taxation need not be determined alone from the terms of any one statute, but is to be determined from the taxing viewed as an integrated whole.

Property that is exempt from taxation in the State of Texas may be divided into three general classes. The first, of course, is property of the United States, and perhaps it would be more proper to use the term "immune" than the term "exempt" with reference to such property. The second class would be property of the State and its political subdivisions. In the third class may be placed all property that is privately owned, but which is made exempt as a matter of legislative grace, either because the property has attained a quasi-public status because of its dedication to

a public use, or because the property is dedicated to a use worthy of encouragement and favor as a matter of public policy, such as an educational, religious, or charitable use. The right to the exemption accorded to any of the three classes of property above listed is strictly restricted and construed in Texas, within the permissible limits of State power. With reference to property of the United States, of course, the question of state power is governed by the federal law, and in general it may be said that the immunity of the United States can not be lost, it can only be waived, by the action of the federal government itself. With reference to the private property that is exempted from taxation by legislative grace, by reason of its manner of use, it is clear that the exemptions are at all times strictly construed, as is shown in the various cases and statutes cited and discussed in the Appendix to this Brief. If only these two classes of exempt property were under consideration here, there would be no question but that *Article 5248* simply effects an equalization of tax burdens between those who use federal property for private purposes, and those who use other property, exempt from taxation when held and used by its owner for public purposes, for the private purposes of the lessees and users. In the case of private property exempt from taxation, the exemption may simply be taken away, as it was given, by the legislature, when the property is put to private use for a profit. In the case of federal property, however, since the exemption is really an immunity not within the power of the state to give or take away, the desired equality must be attained, if at all.

by imposing a tax upon the private lessee, user or occupier of the property. This much is clear.

The only real question in the case, then, arises when the tax treatment of users and occupiers of federal property is compared with that of users and occupiers of State and local government property, and might be posed as follows: In the light of the facts in this case, is there any showing of a real and genuine discrimination against users and occupiers of federal property?

Under the Constitution of Texas, the property of State and local governments is exempt from taxation only when it is used for public purposes, *Section 2, Article VIII and Section 9, Article XI, Constitution of Texas; City of Abilene v. State*, 113 S. W. 2d 631 (Tex. Civ. App. 1937, error dismissed), and no authority exists for the proposition that such property is exempt when not so held and used. The most that can be said about the few decisions of the Texas Courts in this area, in favor of Appellant's position, is that perhaps some decisions may show a fairly liberal construction of the phrase "public use." No case holds, however, that the exemption from taxation will survive a dedication to non-public use of State or local government property. Further, if the exemption should be lost, under the Constitution and statutes, it would presumably be wholly lost: there would be no partial exemption. Again, the legislature gives, and the legislature can take away, and the right to exemption is either present or it is not present.

An important factor in the consideration of this problem consists in this fact: There is no showing in this case, any-

where in the record, that a single example exists in the State of Texas of any State or local government property that is designed for commercial purposes, or that is subject to such private commercial use, and that is leased to private entities for profit, in the same way that the ordinance works in this case, and the many other similar federal properties, are leased to private businesses. The most nearly comparable State or local property would have to be considered the public lands owned by the State and its subdivisions, some of which may be leased to private entities, although there is no showing in this case to that effect, and there is no showing that any use being made of any such State-owned property is comparable to the use that is being made of the federal property in question, or any other federal property being used for a profit by a private person. Further, as is shown by the examples set forth in the Appendix to this Brief, a considerable part of the public property of this State and its subdivisions is expressly made taxable, either in whole or in part; and when in part only, there is a reasonable basis for withholding full taxability.

Appellant attempts to argue in its brief that the fact that the property in question here is held by the government in continued ownership because of its potential value to the national defense, constitutes an additional reason why the use and occupancy of the property should not be subject to taxation. The implication is that this attempt to tax is nothing more than a form of sabotage of the national defense. Where, however, as here, the tax is levied against the

property interest of the user and occupier rather than that of the government itself, the Appellant's argument is not sound, because the only effect that such taxation could have on the federal government, or its defense efforts, would be the indirect economic effect that taxability of the right of use and occupancy would have upon the rent that might be bargained for by the government, and such economic effect is not supposed to have any bearing on the question. *James v. Dravo Contracting Company*, 302 U. S. 134 (1937); *Alabama v. King and Boozer*, 314 U. S. 1 (1941). The only real effect that this extensive ownership of industrial and commercial properties by the United States, and its leasing of these properties to private persons, has upon the question presented here, is that such ownership has the effect of creating a class of persons who use and occupy federal industrial and commercial properties for their own private gain, which class has no counterpart with reference to State property. If the reasoning of Appellant is followed, then this class of persons, who own valuable rights of use and occupancy in such federal properties, would escape the ad valorem State taxation of such property, merely because there is no corresponding class of owners of similar interests in State and local property.

In considering the foregoing, it must always be kept in mind, of course, that the lessee of any property not exempt from taxation, or any other user or occupier of such property, will be presumed to be the person who actually pays, from an economic standpoint, the taxes on the property, either directly, as the owner of the property, or indirectly

in the way of increased rent or other compensation paid for the use of the property. Therefore, the question of whether the lessee, user, or occupier of the property pays the property taxes directly or not, is an immaterial question. Requiring the user or occupier of property upon which the owner pays no taxes, to pay taxes on such property does not discriminate against such user or occupier, but merely puts him on a more equable basis with other persons who are in a similar position to his except that they use and occupy property on which the owner pays the taxes.

Appellant attempts to minimize the extent to which the State of Texas has gone in subjecting its own property, and the property of its political subdivisions, to at least partial taxation. (*See Appellant's Brief, Appendix B.*) When this matter is carefully examined, however, it is seen that actually the extent of such permissible taxation is fairly broad, and that most of it is based upon general considerations very similar to that which makes taxation of Appellant in this case equitable. Appellant is a private corporation, conducting a business for profit. It has employees who have children attending local schools, and Appellant and its employees require all of the local governmental services that are required by any other citizens of the State and local political subdivisions. All questions of immunity and tax exemption of various kinds aside, it just does not shock the conscience to contemplate the imposition of taxes upon Appellant on its interest in the property to the same extent that such taxes would be imposed if Appellant owned the underlying property in fee. "Other things being the same, it

seems obvious enough that use of exempt property is worth as much as use of comparable taxed property during the same interval." *United States and Borg-Warner Corporation v. City of Detroit*, 355 U. S. 466, 470 (1958). Similarly, there are many circumstances in which it seems equitable and proper to remove, at least in part, the tax exemption of certain public properties owned by the State and its political subdivisions, and there are many equally valid reasons for not removing such exemptions entirely and in all cases.

Consider, for example, the lands of the University of Texas. These lands were set apart to the University by the legislature many years ago, *Act of February 11, 1858, General Laws of the State of Texas 1020*, for the purpose of providing a source of income to the University in order that it might fulfill its function, as an agency of the State. To the extent that the income from these lands fails to provide adequate funds for the full program of the University, other funds must be provided by the State to meet these needs. Obviously, therefore, the taxation of property of the University of Texas for state purposes would result in nothing more than taking money from one State fund and transferring it to another, only to have to transfer it back again. Nothing could possibly be gained by such a procedure. Further, the University of Texas is but a part of the entire educational system of the State, the elementary and secondary phases of which are administered by local school districts. Since the State, by special and general appropriations, pays a large part of the cost of all parts of

the whole educational system, again nothing would be gained by transferring funds from the University to the local school systems, and it is therefore quite realistic to exempt the properties owned by one part of this educational system from taxation by the other part. Thus, since it would be a useless thing to require the payment of state or school taxes on the University lands, and since such lands are subject to county taxes, *Article 215th, Revised Civil Statutes of Texas*, it follows that the only real exemption of such University lands from taxation is that from taxation by such local bodies as irrigation districts, water districts, etc., which make up only a very small part of the State and local tax picture in Texas.

Likewise, there is a logical reason for the fact that county school lands remain exempt from taxation for State purposes. *Section 6a, Article VII, Constitution of Texas*. Such county school lands are subject to taxation to the same extent as lands privately owned, except for State purposes. Since the State pays out of its general revenues a large part of the cost of supporting the county school systems of the State, to require counties to pay state taxes on their school lands would result merely in having the money paid in to the State and repaid to the counties, a patently useless procedure.

The same reasoning set forth above with reference to the county and university school lands likewise now, and for a period of more than 60 years past, has applied to all other parts of the public domain in Texas, all of which is now owned by the permanent school fund of the State. In

the Constitution of 1876, one-half of the public domain was set apart and dedicated to the public school fund. *Section 2, Article VII, Constitution of Texas*. By the year 1898, homestead grants, railroad grants, and other dedications of the public domain had more than exhausted all of the public lands of the state not so dedicated to the permanent school fund. *Hogan v. Baker, 92 Tex. 58, 15 S. W. 1004 (1898)*. Thus, today, except for such lands as may be publicly owned for city hall, court houses, parks, schools, and other such specific purposes, all of the public land of this state belongs either to the public school fund, the University of Texas permanent fund, or local county school funds, and any taxation of the same by the State or its local political subdivisions would merely result in the necessity for additional general State appropriations for educational purposes.

C. The "Classification" Problem and the Texas Statute

In its brief, Appellant attempts to contrast the question presented in this case with that presented in the Michigan cases, by attempting to show that, under the Michigan statute, there was an "even-handed and non-discriminatory" tax, which is not found in the Texas statute. Appellant specifically refers to at least three statements found in *United States and Borg-Warner Corporation v. City of Detroit, 355 U. S. 366 (1958)*, showing that under the Michigan statute there was no distinction made between users of exempt property in Michigan, depending upon the ownership of the underlying property.

However, an examination of the Michigan statute reflects that the tax is not as universal in its application as Appellant argues here that it is. The statute itself specifically excludes from its operation and effect several classes of exempt property. The first exclusion is that of a private use of exempt property "by way of a concession in or relative to the use of a public airport, park, market, fair ground or similar property which is available to the use of the general public." The next exclusion is federal property for which payments are made in lieu of taxes in amounts equivalent to taxes which might otherwise be lawfully assessed. The third exception is property of any State-supported educational institution. *Public Act 189, 1953, 6 Mich. Stat. Ann. 1950 (1957 Com. Sapp., Sections 7, 745) and (6).*

Appellee here does not argue that the Michigan statute would be ineffective or invalid by reason of these exceptions. Rather, Appellee contends here, as it has consistently argued heretofore, that the provision for exceptions to a taxing statute does not invalidate the statute. *Carmichael v. Southern Coal & Coke Company, 301 U. S. 495, 509-510 (1937)*. The State has a wide discretion in granting exceptions to its taxing laws, and has a wide discretion in creating and enumerating the permissible classes of property for purposes of taxation. *Watson v. State Comptroller of the State of New York, 257 U. S. 132 (1921)*; *Southeastern Oil Co. v. Texas, 217 U. S. 111 (1910)*.

At page 31 of its Brief, Appellant attempts to belittle a contention previously made by Appellee that the fostering

of local interest, within reasonable bounds, may provide sufficient grounds for distinction in tax treatment. Regardless of Appellant's views on this matter, it is nevertheless true that this Court has, in the past, sanctioned such distinctions. *Watson v. State Comptroller of the State of New York*, *supra*; *Welch v. Henry*, 305 U. S. 134 (1938). Certainly, in the case of the Michigan statute, the exception applicable to property of State-supported educational institutions must necessarily have been placed in the statute to foster the local interests of the State, and yet this exception was not deemed by this Court to have any substantial bearing on the validity of the statute. Likewise, in the present case, although the taxation of private interests in property otherwise exempt, when used for private purposes, is restricted to federal property when *Article 5218* is considered alone, and without regard to other taxing statutes of the state, it is nevertheless shown in this brief (*Appendix*) that almost all property normally exempt from taxation under the general taxing system of Texas loses its exemption when it is used for private purposes, and indeed much of such property otherwise exempt has been subjected to taxation by the legislature, even when not used for private purposes. The State has a wide discretion in determining the classes of exemption from taxation. *Hoffman v. Silas Mason Company, Inc.*, 300 U. S. 577 (1937); *Reister Gumbo Co. v. Virginia*, 253 U. S. 122 (1920). Except for a few possible instances of property devoted to the support of public education in Texas, there has been and can be no showing that exempt property remains exempt when devoted to private use. Thus, while the Michigan

statute reaches this result within itself, the Texas statute in question reaches the same result, when considering *in pari materia* with other relevant State statutes. While there may be some distinction made between the tax status of federal property used for private purposes and other exempt property used for private purposes, these distinctions are minor, and they bear some relationship to a permitted end of government action. *Watson v. State Comptroller of the State of New York, supra.*

D. Congress Has Consented to the Taxation of the Lessee's Interest in the Property

The importance to this case of the *Military Lessor Act of 1917*, Act of August 5, 1917, ch. 193, 61 Stat. 774, should not be minimized. Section 6 of this Act specifically provides that "the lessee's interest, made or created pursuant to the provisions of [this act], shall be made subject to State or local taxation." The Act does not say that the privilege of use shall be made subject to a State privilege tax or use tax. The "lessee's interest" is expressly made taxable. The logical meaning of this provision is that Congress contemplated that the leasehold, or the right of use and possession, or whatever it might be called, would be taxable as a property interest. Further, even if this construction of the Act is not required by the quoted provision, at least no other contrary construction is required thereby. That a property interest was intended to be made subject to taxation is also recognized in *Giffatt Housing Company v. County of Surry*, 351 U. S. 253 (1956). When such consent to taxation has been granted by Congress, the usual

rules with reference to immunity may be ignored, and the statute will be deemed controlling, *Baltimore National Bank v. State Tax Commission of Maryland*, 297 U. S. 209, 211 (1936).

The existence of this consent to taxation even tends to destroy one of the arguments of Appellant that the Texas statute is discriminatory. Appellant, citing *Miller v. Milwaukee*, 272 U. S. 713 (1927) argues that a tax directed against the United States is invalid for no other reason than that it is so directed. Even assuming this construction of *Miller v. Milwaukee* to be correct, a later case modifies the holding in a way that is very pertinent to the present case. *Pacific Computing v. Johnson*, 285 U. S. 480 (1932), considered a California corporate franchise tax which, for the first time, added income from United States bonds to the tax base. It was shown that, after this Court has held such practice permissible, California had amended its constitution and statutes to take advantage of the additional tax permitted. This Court held the tax valid, even though it was obviously designed to levy a tax upon the federal bonds; since it was permitted, the tax would not be held invalid. Thus, in the present case, where Congress has specifically authorized the State tax, this Court should not invalidate the State acceptance of the "invitation to tax" on the ground that accepting the invitation is evidence of discrimination.

Appellee does not contend, of course, that the consent of Congress to tax the lessee's interest constitutes a license to discriminate against such lessees. On the other hand, since

the statute does not specify taxation of the "leasehold," in a technical sense, but uses the words "lessee's interest," the States should be allowed to determine the nature of the lessee's interest in accordance with applicable State law, in such a way as to attempt to equate the tax burdens of private persons using federal property for commercial purposes with those of their business competitors using other types of property.

Uniformity in the field is not required, *Reconstruction Finance Corporation v. Beaver County, Pa.*, 328 U. S. 204 (1946), or obtained, *Missouri v. Personnel Housing, Inc.*, 300 S. W. 2d 506 (Missouri, 1957), (lessee's interest taxed as an interest in realty); *Offutt Housing Company v. County of Sarpy*, 160 Neb. 320, 70 N. W. 2d 382 (1955) (lessee's interest taxed as an interest in improvements on leased public lands); *Grumman Aircraft Engineering Corporation v. Board of Assessors of the Town of Riverhead*, 2 N. Y. 2d 500, 141 N. E. 2d 794 (1957) (lessee's interest is personalty, not subject to local taxation under State law).

It is only when the classification of taxpayers that Appellant erects, consisting of "federal lessees" on the one hand and "other lessees" on the other, is used that any discrimination argument may be advanced. It is not discriminatory "to promote fair competitive conditions and to equalize economic advantages," and to equate the tax burdens of persons using federal property for commercial purposes with their business competitors using non-exempt property, *Great Atlantic & Pacific Tea Co. v. Grosjean*, 301 U. S. 412 (1947).

At page 36 of its Brief, Appellant states that it is not claiming a complete exemption from State taxation. This is a reversal of the position that Appellant has maintained throughout these proceedings to this time. Heretofore, it has asserted that no taxes of any kind could be assessed against it on any interest in the property. (R: 4, 5, 6.) Apparently it is now conceding that the State (and therefore Appellee as well) is authorized to assess taxes against the "lessee's interest," if such taxes are nondiscriminatory. Since this was all that Appellee ever attempted to do (R. 22), and since this is what the Texas Court held was done (R. 188-189), then it appears that the only remaining question in the case should be whether or not the taxes so assessed are discriminatory.

II.

THE TAX IMPOSED IS NOT A TAX UPON FEDERAL PROPERTY

The substance of Appellant's argument in the second major subdivision of its Brief seems to be based upon a contention that the holding of this Court in the 1958 Michigan cases must be limited to those cases where the questioned tax is a use or privilege tax, and that if the tax is labeled ad valorem, a case involving such tax must automatically be deemed analogous to *United States v. Allegheny County*, 322 U. S. 174 (1944). At page 37 of its Brief, Appellant attempts to distinguish the Michigan cases from *Allegheny County* by explaining that "the event giv-

ing rise to taxability (in the Michigan cases) was the use and enjoyment of the property," so that the taxes were held valid as use taxes, while in *Allegheny County* the tax was "accordingly held by this Court to be unconstitutional as an ad valorem tax."

This Court has never been misled by an attempt to substitute semantics for substance. The Court is not concerned with the definition or the precise form of descriptive words applied to a tax, but is concerned only with its practical operation, and the Court will look through form and behind labels to substance. *Lawrence v. State Tax Commission*, 286 U. S. 276, 289 (1932); *City of Detroit v. Murray Corporation of America*, 355 U. S. 489, 492 (1958). Appellant has apparently arrived at its conclusion that this tax must necessarily be invalid as an ad valorem tax on some kind of property interest. Appellant's reasoning is incorrect throughout because it begins with such an incorrect assumption and basic premise. The problem of labels and substance here is discussed by Mr. Justice Harlan, in his separate opinion in the Michigan cases. (355 U. S. 505.) In his opinion, the dissenting Justices were said to have equated "the measure of the tax with the subject of the tax," and that the dissenting opinion "concludes that the tax imposed upon those using tax-exempt property for private profit should be regarded in substance as a tax on the property itself because the privilege tax is measured by the full value of the leased or used property, rather than merely by the value of the lessee's or user's interest." He

also recognized, however, that the effect of the majority opinions in these three cases was virtually to eliminate the distinction, from the standpoint of constitutional validity, between property taxes and privilege taxes, when a tax labeled a property tax is attempted to be applied to a property interest that amounts to a privilege of use and possession. Appellee would agree that if, under the prior decisions, there was any basic distinction, from a constitutional standpoint, between a property tax and a privilege tax, that the distinction was erased by the Michigan cases.

This is not to say, however, that under the prior decisions, there was any real difference between a privilege tax and a property tax, or that a property tax was necessarily invalid. Certainly a property tax upon a property interest less than fee simple ownership is not new. Many years ago, the State of Washington considered the nature of the property interest created by a lease of tax-exempt property. In *Moullier v. Gormley*, 14 Wash. 465, 87 Pac. 506 (1906), the Court said:

"When a lease is given by the State to an individual or private corporation, the lessee thereby obtains for his or its private use, certain rights and privileges in, to and upon such real estate. These rights and privileges constitute private property over which the lessee has, and may exercise, absolute dominion and ownership within the limitations of his or its lease. Why, as such property, it should not be subject to the general rules of taxation we conceive of no reason."

Several years later, the same question that was before the Washington Court, involving the same type of lease and the same taxing statute, was brought to this Court, in *Trimble*

v. City of Seattle, 231 U. S. 683 (1914). The property tax on the interest of the lessee was upheld by this Court, and the Court stated:

"When an interest in land, whether freehold or for years, is severed from the public domain and put into private hands, the natural implication is that it goes there with the ordinary incidents of private property, and therefore is subject to being taxed."

Congress itself has recognized, in such a lease as is involved in this case, that the interest of a lessee is an interest in property which is subject to taxation. The statute authorizing the lease specifically provides that "the lessee's interest, made or created pursuant to the provisions of [this act] shall be made subject to state or local taxation." *Act of August 5, 1947, ch. 493; 61 Stat. 774*. Therefore, even if the tax here is an ad valorem tax, and could not be considered any other type of tax, it does not necessarily follow that the ad valorem tax is on a property interest of the United States, or that it is on the federal property.

A. The Incidence of the Tax is Upon a Private Property Interest of Appellant

Appellant argues (Brief 39-45) that the tax imposed by the Texas statute was necessarily an ad valorem tax on the government property itself, because of certain features of the Texas taxing system which would necessarily require such conclusion.

First, the proviso authorizing the taxation here in question is quoted, at page 39, and Appellant urges that the only operative language in the statute is "any portion of

said lands * * * shall be subject to taxation by this state and its political subdivisions." It is argued that this language could mean only one thing, and that was that the Texas legislature was attempting to legislate away the immunity of the United States to taxation on its property, and that the statute represents an invalid and unconstitutional attempt to tax the property itself. Appellant then accuses the Supreme Court of Texas of "speculating" that the legislature meant to tax "only a lessee of the United States" by this language. "By failing to designate the taxpayer," the Appellant argues, "the Texas legislature clearly manifested its primary concern to tax the property." (Brief 40.)

This argument is not sound. In the first place, the Texas legislature should not be deemed to have attempted to do a vain thing, by attempting to take away an immunity which it did not grant, and which it had no power to take away. Secondly, the Supreme Court of Texas, whose opinion on this matter is due careful consideration, if indeed it is not the final word on the matter, concluded that "it was the intention of the legislature, in amending Article 5248 to make the *value* of the entire property belonging to the United States government, if *used and occupied by private business and operated for profit*, taxable to such user and operator." (R. 181.) Further, "it is a tax levied against the *user and occupier* of such property and is based on the value of the property *used and occupied by it*." (R. 189.) (Italics supplied.)

There should be no difficulty about properly construing this statute, as the Michigan statute contained a similar

lapse in wording, and this Court had no trouble with that statute. The operative words of that statute, in the sense that Appellant has extracted the operative words from the Texas statute, are as follows: "When any real property which for any reason is exempt from taxation is leased, loaned or otherwise made available to and used by a private individual, association or corporation in connection with a business conducted for profit, * * * shall be subject to taxation in the same amount and to the same extent as though the lessee or user were the owner of such property." It is thus seen that some essential word or phrase is omitted from the wording of the Michigan statute; it is not clear from a reading of the statute itself whether it was intended to say that "*the property* shall be subject to taxation" or "*the lessee or user of such property* shall be subject to taxation." This Court did not hesitate to supply the necessary missing words in construing the Michigan statute, so as to make the statute mean that the taxable event was the use, or the privilege of using and occupying, the exempt property; and it should not hesitate to hold, in this case, as the Supreme Court of Texas did, that the intention of the legislature was to levy a tax upon the user and occupier of the property. Only by so holding can the Texas statute have any meaning, because if the statute be held to mean that the legislature intended to impose a direct tax upon the United States on its property, when the property is leased, then the legislature will necessarily have attempted to do a vain and unconstitutional thing, and a legislature will not be presumed to have done so, in the absence of a clear showing of the necessity of such a holding, and unless

there is no other reasonable interpretation that can be placed upon the legislative act. *Porter v. Investors' Syndicate*, 286 U. S. 461, 470 (1932); *Alabama State Federation of Labor v. McAdory*, 325 U. S. 450, 470 (1945).

Appellee has never argued that the tax imposed by the Texas statute is a use or privilege tax. Perhaps it is one; perhaps it is not. Appellant calls it an ad valorem tax, and Appellee has called it an ad valorem tax, but calling it an ad valorem tax does not mean that the tax is levied or assessed on the government property itself. The right and privilege of use and occupancy is a property right, and may be subject to ad valorem taxation. "Lawful possession of property is a valuable right when the possessor can use it for his own personal benefit." *City of Detroit v. Murray Corporation of America*, 355 U. S. 489, 493 (1958). In the Michigan cases, this Court reaffirmed its position that a State tax law would not be invalidated because of empty formalisms of wording, and certainly this would be the result if a tax should be held valid when levied as a use or privilege tax upon the use or privilege involved in the right of use and possession of exempt property, while another tax would be held invalid because it was levied as a property tax on the property right of use and possession of the same property under the same circumstances. If any one thing in this case is clear and certain it is that, under the facts shown, Appellant's interest in Cactus Ordnance Works is exactly the same as the interest of the Borg-Warner Corporation in the Michigan plant, in *United States of America and Borg-Warner Corporation v. City*

of Detroit, 355 U. S. 466 (1958). In each case, an industrial plant owned by the United States was leased to a private corporation for use in the private manufacturing business of the lessee. One other thing is almost that certain, and that is that the Michigan legislature and the Texas legislature were attempting to do the same thing when the two statutes in question were respectively enacted. If this Court should hold, from the standpoint of legislative intent or statutory application, that there is a distinction between the present case and the *Borg-Warner* case, then Appellee believes that "empty formalisms" will have gained a victory.

Appellant urges that the Constitution and laws of the State of Texas would not permit of a holding of this Court that the tax in question is a use or privilege tax. While Appellee has consistently contended, throughout these proceedings and even at the present time in this brief, that there is nothing invalid about a property tax on the property right of use and possession, yet nevertheless Appellee does not concede that the tax could not lawfully be considered a use or privilege tax, under the Constitution and laws of the State of Texas.

It is true that *Section 3, Article VII*, of the *Constitution of Texas* reads in part that "the legislature may authorize an additional ad valorem tax to be levied and collected within all school districts," but it is also true that a previous part of the same section of the Constitution provides that "the legislature shall be authorized to pass laws for the assessment and collection of taxes in all said districts."

This general authorization is not necessarily restricted by the provision that "an additional" ad valorem tax may be levied and collected within the districts. Further, *Section 17 of Article VIII of the Constitution of Texas* provides as follows: "The specification of the objects and subjects of taxation shall not deprive the legislature of the power to require other subjects or objects to be taxed in such manner as may be consistent with the principles of taxation fixed in this constitution."

The Texas Supreme Court has held that this provision of the Constitution means that the legislature has plenary power to prescribe the mode of taxation to raise revenue, and that the Constitution does not prevent the legislature from passing laws requiring other subjects or objects not named therein to be taxed, unless expressly prohibited by the Constitution. *State v. Wynne*, 134 Tex. 455, 133 S. W. 2d 951 (1939).²

So, in the present case, where the Supreme Court of Texas has held that the statute provides for a tax levied against the user and occupier of such property, based on the value of the property used and occupied by it, such holding of the Texas Court should be considered a matter of local law, and if the Texas Court was not disturbed by the failure to specify distinctly whether it was an ad valorem tax, property tax, privilege tax, use tax, or just

An attempt to appeal *State v. Wynne* to this Court was dismissed, for the want of a substantial federal question. *Citro v. S. & A.* The authority cited in the memorandum order dismissing the appeal was *Hobbs v. Mascoutah County*, 196 U. S. 226 (1905), which had held that the question of whether or not a certain Iowa tax violated the Iowa Constitution because it did not distinctly state the tax and the object to which it is to be applied, was a State question, not subject to consideration by the United States Supreme Court.

that it was, then again, this should not be a matter of federal concern. In other words, if there is a substantial federal question posed in this case, it is not a question of just what kind of tax was imposed against Appellant here, and not a question of whether the tax was an ad valorem tax or a use or privilege tax. The statute authorized the tax, and the Supreme Court of Texas construed the statute as authorizing a tax against the user and occupier of the property, based upon the value of the property used and occupied. Whether this sounds more like a privilege tax, or a use tax, or a property tax, should be of no concern to this Court, since the effect of the tax is identical to that imposed by the Michigan statute as applied in *United States and Borg-Warner Corporation v. City of Detroit*, 355 U. S. 66 (1958).

To the extent that the decisions in the Michigan cases may depend upon the distinction between a use or privilege tax and a property tax upon the property interest owned by a user or occupier in the property so used and occupied, it is respectfully submitted that such distinction should now be clearly and directly abolished by this court. The separate opinion of Mr. Justice Harlan in the Michigan cases (355 U. S. 505), indicates his belief that the former distinction between property taxes and privilege taxes as a basis for determining the constitutionality of a State tax against a claim of federal immunity has been, by the majority opinions in such cases, blurred if not completely repudiated. Appellee believes that, if the empty formalism of labels is not to be allowed to rear its head again, such

distinction should be here and now repudiated. Certainly it could not be said that this Court stopped very far short of a complete repudiation of such distinction, in using the following language:

"We see no essential difference so far as constitutional tax immunity is concerned between taxing a person for using property he possesses and taxing him for possessing property he uses when in both instances he uses the property for his own private ends. Nor have we been pointed to anything else which would bar a state from taxing possession in such circumstances." *City of Detroit v. Murray Corporation of America*, 355 U. S. 489, 493 (1958).

B. The Texas Taxing System Authorizes the Imposition of This Tax on the User and Occupier of the Property

As it did in the Supreme Court of Texas, (R. 187) the Appellant relies here upon the old Texas cases of *Daugherty v. Thompson*, 71 Tex. 192, 9 S. W. 99 (1888), *Taylor v. Robinson*, 72 Tex. 364, 10 S. W. 245 (1888), *State v. Taylor*, 72 Tex. 297, 12 S. W. 176 (1888), *Articles 7173 and 7174, Revised Civil Statutes of Texas*, and one case not discussed by the Texas Supreme Court, *Trammell v. Faught*, 74 Tex. 557, 12 S. W. 317 (1889). In its brief (pp. 16-21), Appellant is apparently attempting to argue that the Texas Supreme Court is either unqualified or unauthorized to discuss, analyze, review and apply the law stated in its own cases, and in the statutes of the State.

As Appellant admits in its brief (p. 20), the holding of the Texas Supreme Court in *Daugherty v. Thompson* was that lands owned by the counties for school purposes were

not subject to taxation, because of the then-existing provision of the State Constitution which prohibited such taxation, even the taxation of a leasehold interest therein. In the present case, the Texas Supreme Court so construed the actual holding of the Court. (R. 187.) Other statements by the Court in *Daugherty v. Thompson*, such as those quoted by Appellant in its Brief (pp. 19-20), are nothing but dictum, and have not been followed by the Texas Courts in any case since the year in which the original opinion was written. See *State v. Taylor*, supra.

Thus, as Appellant urges in its Brief, the opinion in *Daugherty v. Thompson* did state that the wording of the present Article 7173, *Revised Civil Statutes of Texas*, should not be taken to mean what it says in clear and unmistakable terms. This interpretation of the statute has not been applied since 1889, and has not been, as Appellant says it has (Brief P. 20), followed since as settled law in Texas. *Daugherty v. Thompson*, insofar as it holds that a leasehold may not be taxed at the value of the fee, was indeed followed on that point in *State v. Taylor*, 72 Tex. 297, 12 S. W. 176 (1888). (This latter case, however, has not once been cited on any proposition by any Texas Court, from the date that it was decided until the date that its validity was questioned by the Supreme Court of Texas in the present case. See *Shepard's Texas Citations*.) *Daugherty v. Thompson* was also cited, for the same proposition, in *Trimnell v. Faught*, 74 Tex. 557, 12 S. W. 317 (1889). Again, although Appellant calls it "the leading case" (Brief, p. 17), this case has not once been cited by

any Texas Court, except when its validity was questioned by the Supreme Court of Texas in the present case, *Shepard's Texas Citations*. In fact, the only Court that ever cited *Trammell v. Fought* did so only to distinguish it as having been probably overruled by later decisions of the Supreme Court of Texas, *Liberty Central Trust Company of St. Louis v. Gilliland Oil Company*, 297 Fed. 294, 498 (D. Tex. 1924).

Appellant also relies upon *Taylor v. Robinson*, 72 Tex. 364, 10 S. W. 245 (1888). This case concerned the attempted taxation of lands set part to Abner Taylor, the builder of the Texas State Capital. He was in possession of the land under a lease entered into between himself and the State, supplemental to his contract with the State, under the terms of which he was slated to earn the lands through his construction of the building. The tax collector contended that he was in possession of the land, therefore, under a "contract for the purchase thereof." The case merely held that his use and possession of the lands was not under his construction contract, but under the lease, which was for an indefinite term, and that the case did not involve taxation of the leasehold. Thus, this case concerned only the construction of the contract and its supplement, and, with one exception, has been cited by later Texas cases on no other proposition. See *Abney v. State*, 47 S. W. 1043, 1045 (Tex. Civ. App. 1898); *Findlay v. State*, 238 S. W. 956, 961 (Tex. Civ. App. 1921); *Rhoads Drilling Company v. Allred*, 123 Tex. 245, 70 S. W. 2d 584 (1934). The exception was when *Taylor v. Robinson* was

cited for the proposition that illegally imposed and involuntarily paid taxes may be recovered back by the taxpayer. *Texas Land & Cattle Co. v. Hemphill County*, 61 S. W. 333, 334 (*Tex. Cir. App.* 1901).

The only one of the old cases relied upon by Appellant that has been cited by later Texas Courts with any frequency is *Daugherty v. Thompson*, 71 *Tex.* 192, 9 S. W. 99 (1888). First, as above indicated, it was cited in *State v. Taylor* and *Trammell v. Faught*, both *supra*. It has been cited several times for the proposition that county school lands are not subject to taxation, even to a lessee under a lease from the county. *Davis v. Burnett*, 77 *Tex.* 4, 13 S. W. 613 (1890); *Continental Land & Cattle Co. v. Board*, 80 *Tex.* 491, 16 S. W. 312 (1891); *Taber v. State*, 85 S. W. 835, 837 (*Tex. Cir. App.* 1905, *error refused*); *Montgomery v. Peach River Lumber Co.*, 117 S. W. 1061, 1063 (*Tex. Cir. App.* 1909) (specifically limiting the holding of the earlier case to this point). It has also been cited for the proposition that property exempted from taxation by the Constitution cannot be taxed by the legislature. *City of Abilene v. State*, 113 S. W. 2d 631, 635 (*Tex. Cir. App.* 1937, *error dismissed*); *A. & M. Consolidated Independent School District v. City of Bryan*, 143 *Tex.* 350, 184 S. W. 2d 914 (1945); *Lower Colorado River Authority v. Chemical Bank & Trust Co.*, 144 *Tex.* 333, 190 S. W. 2d 48 (1945). *Daugherty v. Thompson* has been discussed in one other Texas case, but there it was merely disposed of as not being applicable to the questions there presented. *Big Lake Oil Co. v. Reagan County*, 217 S. W. 2d 171 (*Tex. Cir. App.*

1948, error refused). Thus, the dictum in *Daugherty v. Thompson* has found favor with no Texas Court since 1889, and as the Supreme Court of Texas held in the present case, the validity of the real holding of the case was destroyed by an amendment to the Texas Constitution in 1927. (R. 188.)

C. The Right of Use and Occupancy is a Property Right, Subject to Taxation as Such

Appellee believes that a large part of the argument of Appellant in this case is directed toward questions that are in fact insubstantial. First, Appellee believes that there is no real question but that the tax imposed in this case is not a tax on government property, but is a tax upon the private property interest of a private corporation consisting of the right to the use and occupancy of such government property. This was the holding of the Supreme Court of Texas. (R. 188-189.) The parties to this controversy both understand that it was the private property interest of Appellant that was being subjected to taxation. (R. 149.) The pleadings of the Appellee reflect that the property interest against which the tax was being assessed was the private property interest of Appellant. (R. 22.)

In this connection, it has many times been held that a right of use and possession is a taxable interest, and taxable under the same laws that tax other property interests. *Trimble v. City of Seattle*, 231 U. S. 683 (1914); *Modler v. Gormley*, 44 Wash. 465, 87 Pac. 506 (1906); *Offutt Housing Company v. County of Sarpy*, 351 U. S. 253

(1956); *Kaiser Company, Inc. v. Reid*, 39 Cal. 2d 610, 184 P. 2d 879 (1947); *Bragg Investment Company, Inc. v. Cumberland County*, 245 N. C. 492, 96 S. E. 2d 341 (1957); *Conley Housing Corporation v. Coleman*, 211 Ga. 835, 89 S. E. 2d 482 (1955); *Meade Heights, Inc. v. State Tax Commission*, 202 Md. 20, 95 A. 2d 280 (1953); *Offut Housing Company v. County of Sarpy*, 160 Neb. 320, 70 N. W. 2d 382 (1955); *Sheridanville, Inc. v. Borough of Wrightstown*, 125 F. Supp. 743 (D. N. J. 1957); affirmed, *Fort Dix Apartments v. Borough of Wrightstown*, 225 F. 2d 473 (3rd Cir. 1955), *Cert. Denied*, 351 U. S. 962 (1956); *City of Chicago v. University of Chicago*, 302 Ill. 455, 134 N. E. 723 (1922); *Missouri v. Personnel Housing, Inc.*, 306 S. W. 2d 506 (Missouri, 1957); *Kirtland Heights, Inc. v. Board of County Commissioners of Bernalillo County*, 64 N. M. 179, 326 P. 2d 672 (1958). Except for the first two cases just cited, all of the foregoing cases involve the taxation of a lessee, or of a user and occupier, of property owned by the United States, and the interest of such lessee, user, or occupier in such property was held to be a taxable property interest. Cases found which are to the contrary seem to turn on a question of State law in those situations where the local State law does not provide for taxation of the interest of a lessee of real property. See, for example, *Grumman Aircraft Engineering Corporation v. Board of Assessors of the Town of Rye Beach*, 2 N. Y. 2d 500, 171 N. E. 2d 794 (1957); *Squantum Gardens, Inc. v. Assessors of Quincy*, 235 Mass. 440, 140 N. E. 2d 482 (1957).

There are many situations where the United States owns some interest in a parcel of property, and some other

interest in the same property is owned by private persons. This Court has consistently held such private rights subject to taxation. *S. R. A. v. Minnesota*, 327 U. S. 558 (1946); *Baltimore Shipbuilding & Dry Dock Company v. Baltimore*, 195 U. S. 375 (1904); *Elder v. Wood*, 208 U. S. 226 (1908); *Bothwell v. Bingham County*, 237 U. S. 642 (1915); *City of New Brunswick v. United States*, 276 U. S. 547 (1928).

Secondly, if it is assumed that the tax is in fact levied against a private interest; and not against the federal property, then it must also be found and held by this Court that there is no implied immunity from taxation of this private property, merely because it grows out of property owned by the United States. The tax immunity of the United States does not extend to the private persons with whom it deals even though the activity of such private person promotes some federal government activity. *Federal Compress & Warehouse Company v. McLean*, 291 U. S. 17 (1934); *Broad River Power Company v. Query*, 288 U. S. 178 (1933); *Susquehanna Power Company v. State Tax Commission of Maryland*, 283 U. S. 291 (1931). Further, although it may not be disputed that the United States may grant an immunity by legislation, it must also be recognized that such immunity may be waived by legislation, and that in this case Congress has settled the question of implied immunity by an express waiver and consent to state taxation of the lessee's interest in the property. *Act of August 5, 1947, ch. 493, 61 Stat. 774*. This Court has recognized the effectiveness of this Act to subject to State

taxation the interest of a lessee of such federal property. *Offutt Housing Company v. County of Sarpy*, 351 U. S. 253 (1956).

Further, it follows that if Congress has consented to taxation of the "lessee's interest" in the case of leases of federal property, such as that now before this Court, there is no question but that such taxation may be in accordance with applicable State laws, and that no uniformity of such taxation is required by federal law. *Reconstruction Finance Corporation v. Beaver County, Pa.*, 328 U. S. 204 (1946). This case held that the normal assumption that Congress intends its laws to have the same consequences throughout the nation cannot be made, where Congress has subjected some interest in federal property to State and local taxation, knowing that the several States, and localities within them, have diverse methods of assessment, collection, and refunding, and that tax rates vary widely. Because of the express permission of Congress for State and local taxation of the lessee's interest in the property here under consideration, the State law concerning the nature of that interest, the method of its valuation, and other questions concerning it are not subject to being overridden by federal law.

D. The Tax on the Lessee's Property Interest is Not Discriminatory

Assuming that the foregoing authorities unquestionably settle the questions there raised, it follows that if there is any real question in this case, it is whether or not the Texas

statute in question, as applied, discriminates unconstitutionally against those who deal with the United States by using and occupying, under the conditions set forth in the statute, property of the United States, for their private purposes and for profit. The argument for discrimination, as raised by Appellant in this case, seems to be based upon the proposition that the Texas statute in question, when read alone and when not considered in connection with other applicable Texas taxing statutes, appears to impose a tax upon users and occupiers of federal property only, which tax would have no counterpart in the case of users or occupiers of property other than federal that is exempt from taxation in the hands of the owner.

In determining the question of whether or not a statute discriminates unconstitutionally against those who deal with the United States, it is not sufficient to say merely that the tax does in fact, by its terms, apply only to those who deal with the United States. There are many Texas statutes that, by their terms, apply only to a limited class of property. One statute applies only to livestock, *Article 7155, Revised Civil Statutes of Texas*. Another applies only to securities deposited with the State, *Article 7158, Revised Civil Statutes of Texas*. Another applies to the taxation of railroads and telegraphs, *Article 7159, Revised Civil Statutes of Texas*. There is a special statute for the taxation of personal property, *Article 7165, Revised Civil Statutes of Texas*, and real property, *Article 7166, Revised Civil Statutes of Texas*, of banks. It is necessary, in construing such special statutes, to consider them as a part

of a whole—the taxing system of the state. *Caskey Baking Co., Inc. v. Virginia*, 313 U. S. 117 (1941).

A taxing statute should not be held to be discriminatory against those who deal with the United States, if it is enacted to levy a tax specifically authorized by Congress. Where, for example, Congress has consented to the taxation of the real property of national banks, the Reconstruction Finance Corporation, Federal Savings and Loan Associations, and other federal agencies, it should not be held that a state has enacted a discriminatory statute when it provides, by statute, for the taxation of such property. Under State Law, special enabling legislation might be required in order to accept the benefits of the Congressional consent.

Again, in this connection, substance and not form should be the controlling consideration. The New Jersey statute is considered in *Sheridanville, Inc. v. Borough of Wrightstown*, 125 F. Supp. 743 (D. N. J. 1954). As quoted in the opinion, the New Jersey statute appears to be broad enough to cover all real estate exempt from taxation that is leased to one whose property is not exempt. However, as the court notes immediately thereafter, although this statute contains broad language, its apparent purpose was to provide for the taxation of property leased from the United States, as is reflected by the statement of purpose attached to the statute when introduced in the New Jersey legislature, which statement of purpose is set forth in the margin.

(125 F. Supp. 749.) In spite of this recognition of the fact that lessees of federal property were the object of the legislation, the holding of the district court that the property was taxable was affirmed by the Court of Appeals, *Fort Dix Apartments v. Borough of Wrightstown*, 225 F. 2d 473 (3rd Cir. 1955), and this Court denied certiorari, 351 U. S. 962 (1956).

Perhaps the same vice, if it is a vice, could be laid at the feet of the Michigan statute that has been approved by this Court in the 1958 Michigan cases. As in the case of the New Jersey statute, the Michigan statute purports, by its terms, to apply to property other than federal, but the real purpose of the statute is revealed as having been to secure taxation of private interests in federal property, as reflected by the statement of counsel at page 58 of the Record in this Court in *United States of America v. Township of Muskegon*, and *Continental Motors Corporation v. Township of Muskegon*, as follows:

"Act 189 of 1953 was obviously a remedial or curative Statute designed to supplement the General Property Tax Act and amounting to an amendment thereto. It arose because of a claim then being asserted that this and other similar properties in the State had become exempt or would become exempt within the near future by transfer of title thereto from RFC to the United States or some agency exempt from taxation. The Act was passed to avoid the disastrous consequences upon the local units of government." (R. 58, Nos. 564 and 565, *Supreme Court of the United States*, October Term, 1956.)

This avowed purpose for the enactment of the Michigan statute seems well substantiated by the fact that the statute itself exempts from its terms property used by way of a concession in or relative to the use of a public airport, park, market, fair ground, or other similar property which is available to the use of the general public, as well as federal property for which payments are made in lieu of taxes in amounts equivalent to taxes which might otherwise be lawfully assessed, and property of any State-supported educational institution. *Public Act 189, 1953, 6 Mich. Stat. Ann. 1950-1957 Cum. Supp., Sections 7.7(5) and (6)*. The limited application of such a statute to property other than federal appears obvious. Certainly, an identical statute in the State of Texas would have little, if any, application to property other than federal. As is shown elsewhere in this brief, practically all property that is usually exempt from taxation in the hands of the owner, and when used by the owner for a public purpose, loses its exemption when it is leased or otherwise used with a view to profit, and there is no showing anywhere in the record of this case that any exempt property in the State is leased for profit without losing its exemption. Appellant speaks of discrimination, but none in fact has been shown, and no testimony or other showing in the record in this case reflects any discrimination in fact, or shows that any other lessee, user, or occupier of exempt property in this State, for profit, fails to pay either a direct tax, or an indirect tax in the way of increased rent to a tax-paying landlord.

E. The Immunity of the United States Does Not Extend to Appellant as User and Occupier of Government Property

McCulloch v. Maryland, 4 Wheat. 316 (1819), was the decision of this Court that first announced the doctrines of intergovernmental tax immunity that are supposed to have guided the Court in every decision since that time. In fact, however, the doctrines there set forth have been distorted beyond recognition in many cases, as has been since recognized by this Court. See the opinion of Mr. Justice Rutledge in *Oklahoma Tax Commission v. Texas Company*, 336 U. S. 312, 367 (1949). A trend that might be called a return to "orthodoxy" was begun, according to Professor Powell's analysis, with this Court's 1937 term. Powell, *The Waning of Intergovernmental Tax Immunities*, 58 HARVARD LAW REVIEW 633 (1945).

One of the leading cases in this reversal of direction was *Helvering v. Mountain Producers Corporation*, 303 U. S. 312 (1938). The decision in that case was later characterized by this Court, in *Oklahoma Tax Commission v. Texas Company*, *supra*, as follows:

"The Mountain Producers case was not decided on narrow, merely technical or presumptive grounds. Its very foundation was a repudiation of those insubstantial bases for securing broad private tax exemptions, unjustified by actual interfering or destructive effects upon the performance of obligations to or work for the government, state or national. The decision came as the result of experience and of observation of the constant widening of the exempting process from tax to tax to tax." (*Id.*, 336 U. S. 367.)

To revert for the moment to *McCulloch v. Maryland*, it is remembered that the question there presented concerned the validity of a State tax that was designed purely and simply as an implement of destruction or damage to a federal instrumentality. The State of Maryland was attempting to obstruct the organization and operation of national banks within that State. In striking down the tax, Chief Justice Marshall stated the most famous of all aphorisms in this area of the law:

"The power to tax involves the power to destroy."
(*Id.*, 4 *Wheat.* 431.)

The method whereby this aphorism was adapted to broaden the scope of immunity from taxation may be illustrated by *Indian Territory Illuminating Oil Company v. Oklahoma*, 240 U.S. 522 (1916), holding that an oil and gas lessee of Indian Lands could not be required to pay taxes on the value of such leases, where the court said: "A tax upon the leases is a tax upon the power to make them, and could be used to destroy the power to make them." (240 U.S. 539.) This philosophy provided the decisions for many years, as this Court well knows, and this brief will not be further extended with a citation of the history of such extension of the doctrine of immunity, when applied to private persons dealing with the government.

McCulloch v. Maryland decided only one thing that is pertinent here, however, and that was that the instrumentalities of the federal government were immune from taxation by the States. "The court has bestowed upon this subject its most deliberate consideration. The result is a

conviction that the States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government." (*Wheat*, 136.) Thus, it was a return to orthodoxy when this shield of immunity from State taxation was restored to its rightful place, protecting the United States from State taxation but not also those private persons who merely dealt with the United States. *James v. Dravo Contracting Company*, 302 U. S. 134 (1937); *S. R. A. v. Minnesota*, 327 U. S. 558 (1946); *Alabama v. King & Booker*, 314 U. S. 1 (1941); *Hogdonford v. Silas Mason Company, Inc.*, 300 U. S. 577 (1937); *Hickering v. Mountain Producers Corporation*, 303 U. S. 376 (1938); *Oklahoma Tax Commission v. Texas Company*, 336 U. S. 372 (1949); *Fox Film Corporation v. Doyal*, 286 U. S. 123 (1932); *Graves v. New York, ex rel O'Keefe*, 306 U. S. 466 (1939).

Professor Powell has given us a very complete and scholarly analysis of the course of the decisions of this Court, through the year 1944, that restricted the doctrine of immunity to those situations more directly affecting the United States itself. Powell, *The Waning of Intergovernmental Tax Immunities*, 58 HARVARD LAW REVIEW 633 (1945). But in a succeeding article, he also examines what he chooses to call *The Remnant of Intergovernmental Tax Immunities*, 58 HARVARD LAW REVIEW 757 (1945). It is in this second article that he chose to analyze *United States v. Algebony County*, 322 U. S. 174 (1944).

On page after page he attempts to determine why it is that this case seems to mark a change in the trend established in the 1937 term and continuing, almost without interruption to *Allegheny County*. After discussing and discarding a number of different possible reasons for the distinction between the holding in this case and that in the earlier cases, he finally concluded that, in all probability, the distinction was based upon the fact that the State attempt to tax was directed against property, and not merely against a transaction, and that in the inter-governmental field property may be psychologically regarded as more closely part and parcel of the government than are mere transactions. 58 HARVARD LAW REVIEW 787.

Whether or not the analysis made by Professor Powell is accurate may be open to serious question and considerable speculation. Certainly it is at least true that the question that seemed to give the Court the most pause in *Allegheny County* was whether or not the State tax was laid on property of the United States. Certainly, also, it is clear that the decision was not based upon a finding that the tax was laid directly upon the government property in the hands of the government, because, in form at least, the attempt was being made to tax the private citizen, as a bailee of the government property.

If, however, Professor Powell is correct in his belief that the result in *Allegheny County* was different from that in the earlier cases because of the fact that government property was involved in the questioned tax, then it

would seem clear that such distinction has been swept away by the 1958 Michigan cases, because all three dealt with taxation of a private citizen as a bailee of government property. Both the distinction finally arrived at by Professor Powell, and the belief of Appellee here that this distinction was effectively wiped out by the Michigan cases is apparently shared by Mr. Justice Harlan, as reflected in his separate opinion in the Michigan cases, 355 U. S. 506, 508-10.

Appellee believes that if the distinction between the Michigan cases and *Allgheny County* is that in the one case there was a privilege or use tax, and in the other there was a property tax, then that this distinction should be done away with once and for all, as an insubstantial distinction not based upon any real difference. What difference should there be between a privilege tax upon the right of use and possession, and a property tax upon such right of use and possession, when, under applicable State law, such right of use and possession is deemed a property interest? And, what difference is there between the tax assessed by the State of Texas, and its political subdivisions, as shown in the present case, and the tax assessed by the State of Michigan in *United States and Borg-Warner Corporation v. City of Detroit*, 355 U. S. 466 (1958)? Laying aside for the moment, the question of discrimination because the taxes applies only to federal property, there can be no doubt that the taxes are essentially identical, and that the decision in this case should be governed by the Michigan cases.

From the standpoint of simple justice and fairness, one in the position of Appellant in this case is hard put to argue that it should not be subject to taxation on its right of use and occupancy of the federal property. Appellant is a private corporation, conducting its private business for profit. The lease of the federal property here in question (R. 52-89) provides that for a term of 15 years, with two five-year options for extension, Appellant shall have the right to use the property for its private purposes. (The "re-capture" provisions of the lease are immaterial in view of the fact that the Texas Supreme Court did not predicate taxability upon the existence of the right of use and occupancy for any particular period of time.)

As consideration for this right of use and occupancy for the conduct of its private business, Appellant agreed to pay to the United States an annual rental of \$1,026,666.67. (R. 54.) It may, perhaps, be safely assumed that this figure is not more than the reasonable rental value of the property. The taxes assessed and levied by Appellee on the interest of Appellant in this property, as shown by the pleadings (R. 23-25) vary from approximately \$41,000.00 to approximately \$67,500.00 per year. These claimed taxes are not inconsequential, of course, but proportionately, the payment of these taxes would add very little to the agreed rental. During the five years that are in controversy in this case, the taxes assessed, according to the pleadings, would amount to approximately \$273,000.00.

During this same period, and while Appellant was paying no taxes to the school district, the district was furnish-

ing educational facilities for the children of the employees of the plant, and not having conceived that the property interest of Appellant might be subject to taxation, was receiving federal aid by reason of the impact of such plant upon the school district. (R. 29-32.) During this period, the United States paid to Appellee, as such federal aid, approximately \$188,000.00. Thus, during this period, unless the present tax is validated by this Court, Appellant will have been receiving "the benefits of local government" while failing to "share the burdens" thereof. *Township of Muskegon v. Continental Motors Corporation*, 346 Mich. 218, 77 N. W. 2d 799 (1956). While Appellant's tax-paying competitors were paying their share of the burdens of local government, Appellant was receiving the benefits of local government while sending the bill for a part of these benefits to the United States and its tax-payers. The Michigan Court called such a situation "discrimination", *Township of Muskegon v. Continental Motors Corporation*, 346 Mich. 218, 77 N. W. 2d 799 (1956); *United States and Borg-Warner Corporation v. City of Detroit*, 345 Mich. 601, 77 N. W. 2d 79 (1956), while Appellant argues here that discrimination appears only when it is required to pay the taxes which its competitors pay. There is no question but that Appellant, in the conduct of its private business, competes with others who pay their fair share of the taxes that provide the means of local government, and that the State of Texas and its local instrumentalities provide both

to Appellant and its competitors equal opportunities, protection and benefits. *Wisconsin v. J. C. Penney Co.*, 311 U. S. 455 (1940). Under these circumstances, discrimination appears only if Appellant is contrasted with other "lessees", in a technical sense, rather than with other business enterprises with which it competes.

The record in this case, specifically including the lease contract itself (R. 52-89), clearly shows that during the lease term, Appellant has the full beneficial use of the leased property. Under these circumstances, as this Court has said, "Taxation is not so much concerned with the refinements of title as it is with command over the property taxed—the actual benefit for which the tax is paid." *Corliss v. Bowers*, 281 U. S. 376, 378 (1930). Any right or privilege that is a constituent of ownership may be subjected to taxation. *Nashville, C. & St. L. Ry. v. Wallace*, 288 U. S. 279, 297 (1933). There is no bar to taxation against a person, as if he were the owner when he enjoys such substantial privileges and benefits in the property as to make it reasonable and just to so consider him. *Barnet v. Wells*, 289 U. S. 670, 678 (1933). The test is whether the concept of taxation, and "ownership" for tax purposes, is one that an enlightened legislator might act upon without affront to justice. *Barnet v. Wells*, *supra*; *International Harvester Credit Corporation v. Goodrich*, 350 U. S. 537, 5 (1956). Appellee believes that the tax now before this Court passes this test.

CONCLUSION

Wherefore, Appellee respectfully urges that the judgment of the Supreme Court of Texas be in all things affirmed.

Respectfully submitted,

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October 15, 1959.

APPENDIX

RESTRICTIONS ON AND LOSS OF EXEMPTION
FROM TAXATION UNDER THE TEXAS
TAXING SYSTEM

(a) Land owned by the state, and sold to private entities or persons on long-term contracts, such as land sold under the Veterans' Land Board Program, is taxable to the purchaser, even where legal title to the land remains in the state until it is fully paid for. *Articles 5421m and 7173, Revised Civil Statutes of Texas; Childress County v. State, 127 Tex. 343, 92 S. W. 2d 1011 (1936).*

(b) Where the State of Texas executed a contract to have oil wells drilled in the bed of a navigable stream, agreeing to pay the cost thereof out of a share of production, it was held that such consideration constituted an oil payment subject to taxation in the hands of the contractor. *American Liberty Oil Company v. State, 197 S. W. 2d 381 (Tex. Civ. App. 1946, error refused, n. r. e.).*

(c) To be exempt from taxation, property owned by a church for its minister's residence must be exclusively so used, must yield "no revenue whatever," must be no larger than reasonably necessary, and in no event can it be larger than one acre. *Articles 7150 (1), 7150b, Revised Civil Statutes of Texas.*

(d) To be exempt from taxation, the property of public colleges and academies must be owned and used exclusively for school purposes. *Article 7150(1), Revised Civil Statutes of Texas.*

(e) To be exempt from taxation, the endowment funds of institutions of learning and religion must not be "used with a view to profit." *Article 7150(1), Revised Civil Statutes of Texas.*

(f) A school loses its tax exempt status when not used exclusively for school purposes, as where it is used in part as a residence for the owners, or as a farm. *Edmunds v. City of San Antonio*, 36 S. W. 495 (*Tex. Civ. App.* 1896, *error refused*); *St. Edwards College v. Morris*, 82 *Tex.* 1, 17 S. W. 512 (1891).

(g) Even where property is used exclusively for school purposes, it is not exempt unless the property itself is owned by the institution or person conducting the school. *Smith v. Feather*, 149 *Tex.* 402, 234 S. W. 2d 418 (1950).

(h) School land owned by the Counties of the State of Texas is subject to all taxes except State taxes; that is, it can be taxed by other counties, by cities, school districts, water and reclamation districts, and other taxing bodies. *Section 6a, Article VII, Constitution of Texas; Article 7150a, Revised Civil Statutes of Texas.* While this constitutional provision appears to limit this taxation to agriculture or grazing school land only, in fact there is no school land of any other type, because the act setting apart such land to the counties for school purposes provided that such land would be agricultural or grazing land. *Act of March 26, 1881, 9 General Laws of the State of Texas 157.* Actually, all county school lands were appropriated and set apart for the use and benefit of the counties before the time that any attempt was made by the legislature to clas-

sify land for other than agricultural and grazing purposes. The first such classification act was the *Act of April 17, 1883, 9 Gammett, Laws of the State of Texas 391.*

(i) The State Constitution provides that the property of counties, cities, and towns, is exempt from taxation, but only when it is owned and held *only* for public purposes. *Section 9, Article XI, Constitution of Texas.* The Constitution further provides that the legislature may, by general laws, exempt from taxation, public property *used for public purposes.* *Section 2, Article VIII, Constitution of Texas.* To the extent that the statute (*Article 7150(1), Revised Civil Statutes of Texas*) does not limit the exemption to property so owned and held for public purposes, it is beyond the power of the legislature and is unconstitutional. *City of Abilene v. State, 113 S. W. 2d 631 (Tex. Civ. App. 1937, error dismissed).*

(j) The exemption from taxation of charitable institutions extends only to real property, and does not include personal property. *Article 7150(7), Revised Civil Statutes of Texas; Texas Attorney General's Opinion No. 0-5599.*

(k) Although the Texas legislature has purported to exempt some of the property of fraternal benefit societies, declaring them to be charitable and benevolent institutions, it has been held by the courts that issuance of insurance to its members disqualifies an institution as an institution of purely public charity, and the Attorney General has declared the statute unconstitutional. *Article 10.39, Insurance Code of Texas; Texas Attorney General's Opinion No.*

0-5226; *Concho Camp W. O. W. v. City of San Angelo*, 231 S. W. 1106 (Tex. Cir. App. 1921).

(l) The leasehold interest of a corporation which erects housing projects on military reservations is subject to taxation. *Texas Attorney General's Opinion No. S-124*; See *Offutt Housing Company v. County of Sarpy*, 351 U. S. 290 (1956).

(m) Lands set apart for the endowment of the University of Texas are subject to taxation for county purposes in the counties in which they are located, to the same extent as lands privately owned in such counties. *Article 7150c, Revised Civil Statutes of Texas*. The continued exemption of such lands from State taxation merely prevents the state from having to appropriate money to pay to itself, and the continuing exemption from taxation for school purposes merely prevents one part of the public school system from paying taxes to another part thereof.

(n) When a tax exemption expires during the year, or when a property loses its exempt status during the year, the property becomes subject to taxation for the balance of the year, on a pro rata basis, and if land is condemned by the power of eminent domain during the year, its tax status is determined by its ownership on January 1. *Article 7151, Revised Civil Statutes of Texas*; *State of Texas v. Moody's Estate*, 156 F. 2d 698 (5th Cir. 1946); *Childress County v. State*, 127 Tex. 343, 92 S. W. 2d 1011 (1936).

(o) The property of a municipal housing authority is declared to be "public property used for essential public

and governmental purposes" and is exempted from taxation; but such housing authorities are given express permission to make payments in lieu of taxes to political subdivisions that furnish improvements, services, or facilities, to the extent of the cost thereof. *Article 1269k (22), Revised Civil Statutes of Texas; Housing Authority of City of Dallas v. Higginbotham*, 145 Tex. 158, 143 S. W. 2d 29 (1940).

(p) Although one of the eleven Texas Courts of Civil appeals has held that revenue-producing property of a school is tax exempt, *State v. University of Houston*, 264 S. W. 2d 153 (Tex. Civ. App. 1954, error refused, n. p. c.), this case stands alone, seems to be in conflict with other decisions, and has been questioned by the Executive Assistant to the Texas Attorney General, Geppert, *A Discussion of Tax Exempt Property in the State of Texas*, 11 *Baylor Law Review* 144, 142 (1959). The State urged the taxability of the property in this litigation.

(q) By statute, the property of certain veterans' organizations is exempted from taxation; but only when "not leased or otherwise used with a view to profit." *Article 2150 (20), Revised Civil Statutes of Texas*. However, unless such organizations conduct their affairs so as to be "institutions of purely public charity," the exemption is unconstitutional as to them. *Section 2, Art. X, Constitution of Texas; Texas Attorney General's Opinions Nos. 0-2014 and S-201*.

(r) To be exempt from taxation under the statute, property of an institution of purely public charity must be both owned and used exclusively for public charitable

purposes by such institution; and the exemption from taxation is lost if the use is shared, even by one paying no rent, or even if any rent received is devoted to the charitable purposes of the institution. *Article 7150(7), Revised Civil Statutes of Texas; City of Houston v. Scottish Rite Benevolent Association*, 111 Tex. 191, 230 S. W. 978 (1921).

(c) It has been held that farm property owned and used by a public college was not exempt from taxation, even though it produced no revenue or profit, and was operated only to supply the tables at the school boarding house. Such property was not used exclusively for school purposes. *St. Edwards College v. Morris*, 82 Tex. 1, 17 S. W. 512 (1891).

(d) A statute of the State of Texas provides that toll road property will be exempt from taxation if the owner irrevocably pledges to convey it to the State as soon as the property is paid for, but it has been held that the statute is ineffective to create the exemption, because even though such statute declares the property to be, for tax purposes, "publicly owned," it is not so in fact. *Article 6671c, Revised Civil Statutes of Texas; Texas Turnpike Company v. Dallas County*, 151 Tex. 171, 221 S. W. 2d 100 (1951).

(e) Agricultural demonstration farms are exempt from taxation only when no charge is made for demonstration work, when they are not operated or used with a view to profit, and when all income in excess of that required for maintenance and operation is "used and bound for the use

of other institutions of public charity." *Article 7150(16), Revised Civil Statutes of Texas.*

(v) State prison property is subject to taxation for school purposes. *Article 7150(17)(18), Revised Civil Statutes of Texas.*

(w) State farms employing convict labor are not exempt from county and school district taxes. *Article 7150(4), Revised Civil Statutes of Texas.*

(x) The Texas Employers' Insurance Association, a creature of and an agency of the State, is not exempt from taxation on its property, because it performs a function that is similar to that of a private insurance company. *Texas Employers' Insurance Association v. City of Dallas, 5 S. W. 2d 614 (Tex. Civ. App. 1928, error refused).*

(y) The tax exemption of municipalities in Texas is limited to ad valorem, income, and occupation taxes, and they are liable for motor fuel and other excise taxes. *State v. City of El Paso, 135 Tex. 359, 143 S. W. 2d 366 (1940).*

OCT 21 1959
JAMES R. BROWNING, Clerk

No. 40
IN THE
Supreme Court of the United States
OCTOBER TERM, 1959

PHILLIPS CHEMICAL COMPANY,
Appellant,
v.
DUMAS INDEPENDENT SCHOOL DISTRICT,
Appellee.

*On Appeal From the Supreme Court
of the State of Texas*

**BRIEF FOR THE STATE OF TEXAS
AS AMICUS CURIAE**

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AS AMICUS CURIAE**

Opinions Below

The opinion of the Supreme Court of Texas (R. 177-203) is reported at 316 S. W. 2d 382. The Opinion of the Texas Court of Civil Appeals for the Seventh Judicial District (R. 165-170) is reported at 307 S. W. 2d 605. The District Court of Moore County, Texas, issued no written opinion; its judgment is contained at R. 38-48.

Jurisdiction

Jurisdiction is properly laid in this Court. The facts stated in Appellant's Statement of Jurisdiction are correct.

Statute Involved

Article 5248, Tex.Rev.Civ.Stat.1925, as amended by Ch. 37, Tex. Sess. Laws 1950, 51st Leg., 1st C. S., is directly involved in this case. The pertinent portions thereof are as follows:

"The United States shall be secure in their possession and enjoyment of all lands acquired under the provisions of this title; and such lands and all improvements thereon shall be exempt from any taxation under the authority of this State so long as the same are held, owned, used and occupied by the United States for the purposes expressed in this title and not otherwise; provided, however, that any personal property located on said lands, which is privately owned by any person, firm, association of persons or corporation shall be subject to taxation by this State and its political subdivisions; and provided, further, that any portion of said lands and improvements which is used and occupied by any person, firm, association of persons or corporation in its private capacity, or which is being used or occupied in the conduct of any private business or enterprise, shall be subject to taxation by this State and its political subdivisions."

Questions Presented

This case is concerned with the effect of the taxes imposed by Art. 5248, Tex.Rev.Civ.Stat., 1925, as amended by Ch. 37, Tex. Sess. Laws 1950, 51st Leg., 1st C.S., upon lessees of Federal property. The Appellant propounds three questions (Appellant's Brief, 4-5):

"1. Whether Chapter 37 is, as here applied, repugnant to the Constitution of the United States and invalid because it discriminates against the United States and those with whom it deals, imposes an unconstitutional burden on the activities of the Federal Government and infringes upon its sovereignty.

"2. Whether Chapter 37 is repugnant to the Constitution of the United States and invalid as violative of the Due Process and Equal Protection Clauses of the Fourteenth Amendment because it constitutes discriminatory and arbitrary class legislation against lessees of Federal property.

"3. Whether Chapter 37 is repugnant to the Constitution of the United States and invalid because it taxes to Phillips certain property, which is owned, not by Phillips, but by the United States and on which the State, since Congress has not assented thereto, may not assess taxes."

As argued in the Appellant's Brief, the questions are resolved to two:

1. Whether the tax imposed by Art. 5248, Tex. Rev.Civ.Stat. 1925, as amended, unconstitutionally discriminates against the United States or its lessees.

2. Whether the tax imposed by Art. 5248, Tex. Rev.Civ.Stat. 1925, as amended, constitutes an ad valorem tax upon Federal property.

Statement

The statement of the facts and history of this case contained in the brief for the United States as

amicus curiae is correct, Appellant's statement is substantially correct, but must be qualified in two respects.

In the third paragraph of its statement, Appellant says:

" . . . the local assessor assessed and placed the Ordinance Works upon the tax rolls in the name of Phillips Chemical Company as owner of the property and the School District sought to collect from Phillips the taxes thus assessed"

This wording implies that the property belonging to the United States Government was assessed for taxation in the name of the Appellant. The property assessed was the Appellant's leasehold interest, a fact amply evidenced by the record and clearly understood by the Phillips Chemical Company. (R. 144, 133, 149, 152).

Appellant also states that the Texas Supreme Court held that the 1950 Texas Statute (Ch. 37, Tex. Sess. Laws, 1950, 51st Leg., 1st C. S.) subjected Phillips to taxation for the full fee value of the government owned Ordinance Works. The Texas Supreme Court did not so hold; at the instance of the Appellant the question of the proper valuation of the leasehold interest for the purpose of taxation was segregated from the question of taxability, *vel non*, of such interest. (R. 37-38). Although there is language in the decision of the Texas Court of Civil Appeals and in the decision of the Supreme Court of Texas indicating that Appellant's interest was properly assessed at the full fee value of the property, (which

language will doubtless be persuasive when the question of value is directly presented for decision) this question has not yet been expressly decided; consequently, the decision of this Court on the questions presented cannot turn on the point of improper valuation of the leasehold interest. However, since it is the earnest contention of the State of Texas that the value of the entire fee is the proper measure of value in assessing Appellant's leasehold for taxation, and that this method of valuation does not render the tax discriminatory, nor make it an unlawful exaction or a prohibited burden upon the property or activities of the Federal Government, this brief will reply to the arguments of the Appellant based on the assumption that the question of value has been decided as expressed in Appellant's Brief. But, it must be emphasized that should this Court decide that Art. 5248, Tex.Rev.Civ.Stat. 1925, levies a valid tax upon the interest of lessees of Federal property, but that valuation of the interest at the fee value of the property renders the tax discriminatory or an unlawful burden on the Federal Government, the decision below must still be upheld.

Argument

I

THE TAX DOES NOT UNCONSTITUTIONALLY DISCRIMINATE AGAINST THE UNITED STATES OR ITS LESSEES.

The property involved in this case, known as the Cactus Ordinance Works, is one of approximately

1200 industrial plants constructed by the United States Government during World War II. Under the Military Leasing Act, many of such plants, including the Cactus Ordinance Works, are being held for profit by private industries under long term leases. The Federal Government has expressly consented to taxation of the interests created by such leases. Act of August 5, 1947, Public Law 364, 80th Congress (codified in 10 U.S.C.A., 1270d.) Consequently, taxability, *vel non*, of Appellants interest in the Cactus Ordinance Works is not open to question. The Dumas Independent School District assessed said interest for taxation under the authority of Art. 5248, Tex.Rev.Civ.Stat. 1925. Appellant contends that the tax thus assessed constitutes an ad valorem tax on Federal property and is discriminatory against the Government and those with whom it deals.

The questions raised by this Appeal are of utmost importance. This Court's opinion will seriously affect future ad valorem taxation by a great number of the counties, school districts and other taxing authorities of the State.

It is the firm belief of the State of Texas that the tax assessed by the Dumas Independent School District against the leasehold interest of the Phillips Chemical Company is not a tax upon Government property, and that it does not unconstitutionally discriminate against the United States or those with whom it deals. In accordance with the order established by the Appellant, the question of discrimination will be discussed first.

Delineation of The Different Tax Treatment of Federal and State Lessees:

In order to properly evaluate Appellant's argument that Art. 5248, Tex Rev.Civ. Stat. 1925, is discriminatory, it is necessary that the exemption from taxation accorded various types of property by the laws of the State of Texas be reviewed.

The Texas Constitution provides that all property in the State, other than municipal, shall be taxed in proportion to its value. Tex. Const. Art. VIII, Sec. 1. In view of this provision, all exemptions of property in Texas, other than the exemption accorded property of the Federal Government, must find sanction in the Texas Constitution.

Article XI, Sec. 9, Tex. Const., expressly exempts publicly held property in the following language:

"Sec. 9. The property of counties, cities and towns, owned and held only for public purposes, such as public buildings and sites therefor, fire engines and the furniture thereof, and all property used, or intended for extinguishing fires, public grounds, and all other property devoted

In actuality, the exemption of Federal property from State taxation is granted by Sec. 4 of Art. 7159, Tex. Rev. Civ. Stat. 1925, enacted pursuant to Art. VIII, Sec. 2, Tex. Const. But it goes without saying that such property would be exempt even in the absence of this provision, such exemption being grounded in the theory of inter-governmental immunity from taxation originally propounded by the case of *McCulloch v. Maryland*, 4 Wheat. 316 4 L. Ed. 579 (1819).

exclusively to the use and benefit of the public shall be exempt from forced sale and taxation,

Article VIII, Sec. 19, Tex. Const., exempts from taxation farm products and family supplies. Sec. 1-b of Article VIII, Tex. Const., exempts \$3,000 of the assessed taxable value of residence homesteads from taxation for State purposes; Section 1 of the same article exempts household and kitchen furniture in the amount of \$250.

All other exemptions from taxation stem from the provisions of Section 2 of Article VIII of the Texas Constitution, which specifies certain types of property the Legislature may exempt from property taxation, and provides that all other exemptions shall be null and void. This Section reads as follows:

"All occupation taxes shall be equal and uniform upon the same class of subjects within the limits of the authority levying the tax; but the legislature may, by general laws, exempt from taxation public property used for public purposes; actual places or [of] religious worship; also any property owned by a church or by a strictly religious society for the exclusive use as a dwelling place for the ministry of such church or religious society, and which yields no revenue whatever to such church or religious society; provided that such exemption shall not

As is readily apparent, the foregoing exemptions are personal to the possessor of the property described, and have no relation whatsoever to the point in issue in the instant case; consequently, these provisions will not be further discussed.

extend to more property than is reasonably necessary for a dwelling place and in no event more than one acre of land; places of burial not held for private or corporate profit; all buildings used exclusively and owned by persons or associations of persons for school purposes and the necessary furniture of all schools, and all property used exclusively and reasonably necessary in conducting any association engaged in promoting the religious, educational and physical development of boys, girls, young men or young women, operating under a State or National organization of like character; also the endowment funds of such institutions of learning and religion not used with a view to profit; and when the same are invested in bonds or mortgages, or in land or other property which has been and shall hereafter be bought in by such institutions under foreclosure sales made to satisfy or protect such bonds or mortgages, that such exemption of such land and property shall continue only for two years after the purchase of the same at such sale by such institutions and no longer, and institutions of purely public charity; and all laws exempting property from taxation other than the property above mentioned shall be null and void."

The Legislature, acting under the authority of the Constitutional provisions above quoted, has enacted statutory exemptions from property taxes to the following:

(1) Property of schools and churches.

Art. 7150, Sec. 1, Tex. Rev. Civ. Stat. 1925, and Art. 7150b, Tex. Rev. Civ. Stat. 1925. In order to qualify for

(2) Property of religious, educational and physical development associations owned or used exclusively in conducting any association engaged in the threefold religious, educational and physical development of boys, girls, young men and young women, and *not leased* or otherwise used with a view to profit.

(3) Cemeteries not used for profit.

(4) Property belonging to the State or any political subdivision thereof, or the United States.

(5) All lands, houses and buildings belonging to any county, precinct or town *used exclusively* for the support or accomodation of the poor.

(6) Real property *owned and used exclusively* by public charities *not leased or used for profit.* (Since the brief submitted by the United States Government as *amicus curiae* in the instant case makes the patently incorrect statement that property owned

exemption, school property must be owned by the institution or person conducting the school, and must be *used exclusively* for school purposes, *Edwards v. City of San Antonio*, 36 S.W. 195 (Tex. Civ. App. 1896, *overruled*); *Smith v. Feather*, 149 Tex. 102, 231 S. W. 2d 418 (1950); the property of a church, to be exempt, must (1) be used as an actual place of worship and (2) yield no revenue to the church or religious society, or (3) be used exclusively as a dwelling place for the ministers of the church. See commentary, "A Discussion of Tax-Exempt Property in the State of Texas," *Baylor Law Review*, Vol. XI, No. 2, page 110, et. seq.

*Art. 7150, § 2a, Tex. Rev. Civ. Stat. 1925.

*Art. 7150, § 3, Tex. Rev. Civ. Stat. 1925.

*Art. 7150, § 4, Tex. Rev. Civ. Stat. 1925.

*Art. 7150, § 6, Tex. Rev. Civ. Stat. 1925.

*Art. 7150, § 7, Tex. Rev. Civ. Stat. 1925.

by charitable institutions is not taxed even though leased, and the Appellant's Brief implies as much, it must be emphasized that immediately upon being *leased or used for profit* such property loses its exemption and is taxed at its entire fee value to the owner thereof. See *Markham Hospital v. City of Longview*, 191 S. W. 2d 695 (Tex. Civ. App. 1945, error ref'd.); *City of Houston v. Scottish Rite Benev. Ass'n*, 111 Tex. 191, 230 S. W. 978 (1921).

(7) Public libraries and personal property belonging thereto.

(8) Market houses, public squares or other public grounds, town or precinct houses or halls, *used exclusively* for public purposes; and all works, machinery or fixtures belonging to any town used for conveying water to such town.

(9) Fire engines and other implements owned by towns and cities used for extinguishment of fires, and buildings *owned exclusively* for the safe-keeping thereof.

(10) Pensions granted by the State or the United States.

(11) Buffalo and catalo.

Art. 7159, § 8, Tex. Rev. Civ. Stat., 1925.

Art. 7159, § 9, Tex. Rev. Civ. Stat., 1925.

Art. 7159, § 10, Tex. Rev. Civ. Stat., 1925.

Art. 7159, § 12, Tex. Rev. Civ. Stat., 1925.

Art. 7159, § 13, Tex. Rev. Civ. Stat., 1925.

(12) All property belonging to art leagues and societies of fine arts *devoted wholly and without charge* to the promotion of education and learning.

(13) Property of the Boy Scouts and Girl Scouts *used exclusively* for the promotion of the religious, educational and physical development of the members thereof.

(14) Lands, buildings, personal property and endowments *used exclusively* by any person or association of persons for the maintenance and operation of demonstration farms for the purpose of teaching modern and scientific methods of farming to others, *without charge*, and *not operated with a view to profit*.

(15) County buildings used for jails, courts, or county offices.

(16) Fraternal benefit societies if not leased or used with a view to profit.

(17) Property of national banks exempted by the laws of the United States.

(18) Obligations of navigation districts.

Art. 7159, § 11, Tex. Rev. Civ. Stat., 1925.

Art. 7159, § 15; Art. 7170, Tex. Rev. Civ. Stat., 1925;

condition of exclusive use is imposed by Article VIII, § 2, Tex. Const.

Art. 7159, § 16, Tex. Rev. Civ. Stat., 1925.

Art. 7159, § 5, Tex. Rev. Civ. Stat., 1925.

Art. 1039, Tex. Ins. Code, 1951; again the condition of exclusive use cannot be leased or used for profit is imposed by Art. VIII, Sec. 2, Tex. Const.

* Art. 7165, § 2, Tex. Rev. Civ. Stat., 1925.

Art. 8217a, § 11, Tex. Rev. Civ. Stat., 1925.

(19) Headquarters buildings of Texas Congress of Parent and Teachers owned and used exclusively by such association.

(20) Property of municipal housing authorities.

(21) Property of the Texas Federated Women's Clubs which is not *leased or used for profit* and which is *used exclusively* for one of the exempt purposes expressed in Art. VIII, Sec. 2, Tex. Const.

(22) Property of the American Legion and other veterans organizations which is not leased or used with a view to profit.

If the Legislature, in putting into effect the permission granted by the Texas Constitution to exempt certain types of property, goes beyond the authority granted or broadens the exemption so as to embrace institutions or property not contemplated by the framers of the Constitution, the statute is to that extent void, *Dickison v. Woodmen of*

Art. 7150d, § 1, Tex. Rev. Civ. Stat., 1925; the requirements of ownership and exclusive use are imposed by Art. VIII, Sec. 2, Tex. Const.

Art. 1269k, § 22, Tex. Rev. Civ. Stat., 1925.

Art. 7150, § 19, Tex. Rev. Civ. Stat., 1925; the restrictions on use are imposed by the constitutional article.

Art. 7150, § 20, Tex. Rev. Civ. Stat., 1925; Attorney General's Opinion (Texas) No. 8-201, dated June 11, 1956, held that whether the American Legion and other veterans organizations are exempt from taxation as institutions of purely public charity, depends upon the manner in which such organization conducts its affairs; and that if, in fact, the Post does not qualify as an institution of "purely public charity" under Section 7 of Article 7150, Tex. Rev. Civ. Stat., 1925, it is not tax exempt.

the World Life Insurance Society, 280 S.W. 2d 315 (Tex. Civ. App. 1955, *error ref'd.*) It is the policy of the State of Texas that all property should be taxed unless it comes clearly within an exemption provided by law. *B.P.O.E. Lodge v. City of Houston*, 44 S. W. 2d 488 (Tex. Civ. App. 1931, *error ref'd.*) Tax exemptions are never favored, and in case of doubt as to whether the taxpayer has shown by the facts that he is entitled to the exemption the doubt must be resolved in favor of the taxing power and against the exemption. *Raymondville Memorial Hospital v. State*, 253 S.W. 2d 1012 (Tex. Civ. App. 1952, *error ref'd.*, *N.R.E.*) An examination of the categories of property enumerated above discloses that (exclusive of consideration of Federal property) there is only one class of property, exempt to its owner, that may be rented or leased for a non-exempt use without completely destroying the exemption, i.e., property belonging to the State or its political subdivisions. Subjecting any other type of exempt property to the type of lease involved in the instant case would have the immediate effect of destroying the exemption and causing the property to be taxable at the entire fee value to the owner.

Not even state owned property may be leased completely without limitation. The public purpose

The laborious, detailed review contained above is included in this brief solely to illustrate this fact; the point cannot be over emphasized, since, as pointed out above, both the brief of the Appellant and the brief of the United States Government as *amici curiae* are misleading in the implication that property of exempt organizations other than the State of Texas remains exempt though leased.

of the property cannot be abandoned, and the revenue from the renting or leasing must inure to the public benefit. *State v. City of Beaumont*, 161 S.W. 2d 344 (Tex. Civ. App. 1942, *no writ history*); *City of Abilene v. State*, 113 S. W. 2d 631 (Tex. Civ. App. 1938, *error dismissed*.) Further, specific types of state owned property are taken out of the operation of the exemption. Art. VIII, Sec. 6a, Tex. Const., expressly provides that all agricultural or grazing school land granted to the several counties of this State shall be subject to taxation except for state purposes.²⁶ State farms employing convict labor on state account is subject to taxation for county and independent school district purposes, and the taxes are to be paid out of the General Revenue Fund of the State. Art. 7150, Sec. 4, Tex. Rev. Civ. Stat. 1925. All State prison property must bear its proportionate part of any bond tax of a public school district, and of any maintenance tax of a public school district within which the property of the state prison is located. Art. 7150, Secs. 17 and 18.

²⁶A word of explanation in reference to the Texas ad valorem tax structure is necessary at this point. The State of Texas in 1951 abandoned the ad valorem tax for general revenue purposes. Only counties, cities, independent school districts, and other districts created and gaining taxing authority pursuant to the Texas Constitution may levy, assess, and collect the ad valorem tax. However, the State of Texas receives \$0.35 per \$100.00 of county assessed valuation for the Permanent School Fund (Art VIII, Sec. 9, Tex. Const.), \$0.05 per \$100.00 of the taxes collected by the counties at the county assessed valuation for the College Building Fund, (Art. VII, Sec. 17, Tex. Const.), and \$0.02 per \$100.00 of the taxes collected by the counties at the county assessed valuation for the Confederate Pension Fund. (*Ibid*).

Tex.Rev.Civ.Stat. 1925. Lands set apart for the endowment of the University of Texas, an agency of the State of Texas, are subject to taxation for county purposes. Art. 7156, Tex.Rev.Civ.Stat. 1925.

The claim of discriminatory taxation must be examined in light of the foregoing. Obviously, there is no discrimination in favor of lessees of privately owned exempt property, since leasing of such property causes it to be taxable in fee to the owner. As stated by Mr. Justice Holmes in *Trimble v. City of Seattle*, 231 U.S. 683, (1914):

"In ordinary cases the whole property is taxed and what party shall bear the burden is not a matter of public concern. . . ."

See also *Daugherty v. Thompson*, 9 S.W. 99 (Tex. Sup. Ct., 1888). As pointed out in the *Trimble* case, the argument for inequality really works the other way, for if lessees of Federal property go untaxed, they become notably favored over lessees of exempt property belonging to private individuals, who are, in practical operation, on the same footing with lessees of non-exempt private property.

Any claim of discrimination must rest solely on the difference in tax treatment accorded lessees of Federal property and state owned property. (As

This case, heavily relied upon by Appellant as creating the condition requiring a finding of discriminatory taxation, recognize this proposition and also the fact that privately owned property leased for a non-exempt use loses its exemption entirely.

When used in this Brief, the word "State" refers to the State of Texas or any political subdivision thereof, and

evidenced by the preceding discussion, the latter category includes only state property not expressly made subject to taxation, where the public purpose thereof has not been abandoned and where the revenue from the leasing or renting inures exclusively to the public benefit.)

This difference in tax treatment warrants examination. Art. 7173, Tex.Rev.Civ.Stat. 1925, provides that property exempt to its owner leased for a period in excess of three years shall be taxed to the lessee; Art. 7174 provides that taxable leasehold interests shall be valued for taxing purposes at the fair market value of the lease.

The case of *Dougherty v. Thompson*, *supra*, held that property which is exempt by virtue of the mandatory provisions of the Texas Constitution could not be taxed even under Art. 7173 and 7174, Tex.Rev. Civ.Stat. 1925. Though this case is poorly reasoned and injected much confusing dictum into the law of Texas taxation, most of which has been disregarded by the Texas courts, its holding has not been directly overruled and must be reckoned with in categorizing, for tax purposes, privately held interests in state owned property. If this case be given a literal interpretation and following, lessees of property exempt from taxation by virtue of the mandatory provisions of Art. XI, Sec. 9, Tex. Const., would escape taxation. (Art. XI, Sec. 9, Tex. Const., has been construed, in effect, so as to encompass all state owned properties. See *Lower Colorado River*

the term "state owned property" includes property owned by the State or any such subdivision.

Authority v. Chemical Bank & Trust Co., 144 Tex. 326, 190 S. W. 2d 48 (1945); *State v. University of Houston*, 264 S. W. 2d 153 (Tex. Civ. App. 1954, error *re'fd.* N. R. E.) However, decisions in *State v. Taylor*, 12 Tex. 297, 12 S. W. 176 (1888), and *Big Lake Oil Co. v. Reagan County*, discussed below, indicate that a lease of state property is taxable to the lessee under Art. 7173, valued as under 7174. The case of *City of Abilene v. State*, *supra*, contains language directly in conflict with the holding in the *Daugherty* case. The Court in this case reasoned that Art. XI, Sec. 9, exempted only property used exclusively for public purposes, and property not so used, *e. g.*, property subject to a lease for a non-public purpose, is not exempted by Art. XI, Sec. 9, but by Art. 7150, Sec. 4, Tex. Rev. Civ. Stat. 1925, enacted pursuant to Art. VIII, Sec. 2, Tex. Const. Under this state of facts, state owned property, when leased, would be subject to taxation under Articles 7173 and 7174, Tex. Rev. Civ. Stat. 1925. This latter position is assumed both by the Appellant and by the Federal Government in its *amicus curiae* brief. Obviously, it is the more logical position, for when an interest in land is severed from the public domain and put in private hands, it should go there with the ordinary incidents of private property and subject to such taxation as may be provided by the State. See *Trimble v. City of Seattle*, *supra*. It is submitted that the foregoing authorities have, for all practical purposes, vitiated the holding in the *Daugherty* case, and that, should the question ever be again put squarely before a Texas court for decision, the court would

have no alternative but to declare the case overruled. (The fact that this question has not been directly in issue since the *Daugherty* case bears mute testimony to the lack of leasing activities on the part of the State, a point which will be emphasized later in this brief.) It is the contention of the State of Texas that regardless of the vitality, *et. passim*, of the *Daugherty* case, as regards lessors of Federal property the differentiation in tax treatment that results is a legitimate and reasonable exercise of the State's power of classification for tax purposes.

The case of *Big Lake Oil Co. v. Reagan County*, 217 S. W. 2d 171 (Tex. Civ. App. 1948, *error ref'd.*), is seemingly in direct conflict with the *Daugherty* case, and creates an apparent exception to taxation of a leasehold interest in State property under Arts. 7173 and 7174. This case held that the interest of a private individual acquired in an oil and gas lease of state university school land was fully taxable to such individual at the full value of such interest. The court held that Arts. 7173 and 7174 had no application, since the oil and gas leases, authorized under the Leasing Act of 1917, was, in effect, a grant, and the property interest acquired thereunder was a separate legal estate taxable to the owner thereof. The estate held by the lessee was characterized as a determinable fee title to the oil and gas underlying the lands covered by the lease. The court stated that Art. 7173 is to be construed not in the light when the construction is given, but in the light of the meaning attached thereto at the time of its passage; since the leasing act authorizing the oil and gas

leases of state owned land was not in existence at the time of passage of Art. 7173, the Court deemed the Article inapplicable to the estate created by such leases.

In summary of the preceding discussion, it can be seen that:

1. State owned property not expressly made subject to taxation may be leased without destroying the exemption accorded thereto if (1) the public purpose of the property has not been abandoned, and (2) all revenue from the renting or leasing inures exclusively to the public benefit.

2. A leasehold interest in State owned property will be taxed under Arts. 7173 and 7174, Tex. Rev. Civ. Stat. 1925.

3. The Big Lake case creates an exception to the applicability of Arts. 7173 and 7174.—

The question that must be determined is whether taxation of Federal lessees under Art. 5218, Tex.

At page 29 of its brief, Appellant, in arguing that there is no reasonable basis for distinguishing lessees of State and Federal property, states:

"To cite the most outstanding example of such properties, as is generally known, the extremely rich and prolific oil and gas lands of Texas and its subdivisions are periodically leased for millions of dollars to private corporations."

The appellant would imply from this statement that such properties are untaxed in the hands of such corporations. The *Big Lake* case clearly illustrates that this is patently incorrect; the full value of the mineral interest gained pursuant to such oil and gas leases is taxed.

Rev.Civ.Stat. 1925, constitutes unconstitutional discrimination in favor of the restricted class of state owned property that may be leased without being taxed at its full fee value.

A. The State's Power of Classification For Purposes of Taxation is Extremely Broad.

Restrictions imposed by the Federal Constitution upon a state's power of taxation have been said to be "extremely limited." *Wisconsin v. J. C. Penney Company*, 311 U. S. 435 (1940) at page 445. It is recognized that absolute equality in taxation is impossible of attainment. *Atchison T. & S. F. Ry. Co. v. Collins, et al.*, 294 F. 742, 745 (U. S. D. C., N. D. Cal., circa 1923), dismissed 267 U. S. 609. Hence, it is well settled that a state legislature has a wide range of choice in classifying and limiting the subjects of taxation. *Henneford, et al. v. Silas Mason*, 300 U. S. 577 (1937), and cases there cited; see also *Keeney v. Comptroller of the State of New York*, 222 U. S. 525 (1912); *Rivera v. Buscaglia*, 146 F. 2d 461 (C.C.A., 1st Cir. 1944). In exercising such choice, it may make classifications of property for the purpose of ad valorem taxation. *Allied Stores v. Bowers*—U. S.—79 S. Ct. 437 (1959); *Brown County, Texas v. Atlantic Pine Line Company*, 91 F. 2d 394 (C. C. A., 5th Cir., 1937); and see *San Jacinto National Bank v. Sheppard*, 125 S.W. 2d 715 (Tex. Civ. App. 1938); and 84 Corpus Juris Secundum, § 36-b, p. 122.

In erecting classes for the purpose of taxation, the States are subject to the equal protection clause of the Fourteenth Amendment.

"... But that clause imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to reasonable schemes of state taxation. The state may impose different specific taxes upon different trades and professions and may vary the rate of excise upon various products. It is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value. [Citing numerous cases] *Allied Stores of Ohio, Inc. v. Bowers*—U. S.—79 S.Ct. 437, 440-441, (1959).

(To the same effect see *Ohio Oil Co. v. Conway*, 281 U.S. 146 (1930); *Wisconsin v. J. C. Penney*, *supra*; and see *Atchison T. & S.F. Ry. Co. v. Collins, et al.*, *supra*, and the *Michigan Railroad Tax* cases, 138 F. 223 (Cir. Ct. W.D. Mich. S.D. 1905). There can be no arbitrary and unreasonable discrimination in taxation, but where there is a difference, it need not be great or conspicuous to warrant classification. *Kennedy v. Comptroller of State of New York*, *supra*. A classification, though discriminatory, is not arbitrary nor violative of the Equal Protection Clause if any state of facts reasonably can

The equal protection clause and the provisions of a State Constitution requiring equality and uniformity of taxation impose identical restrictions upon the State. *National Tea Co. v. State*, 286 N. W. 360 (Minn. Sup. Ct. 1939); and see *Union Bank & Trust Co. v. Phelps*, 288 U. S. 181 (1933); and *Brown County, Texas v. Atlantic Pipe Line Company*, 91 F.2d 391 (C.C.A., 5th Cir. 1937).

be conceived that will sustain it. *Allied Stores of Ohio v. Reuters*, *supra*, and cases there cited. In the last named case this Court pointed out that the special motives or reasons of a legislature in making a classification need not be known to the Court; the Court then detailed facts that it considered sufficient to justify the classification and assumed the existence of those facts. (See 79 S.Ct. 442). In this connection, see also *Bekins Van Lines v. Riley*, 280 U.S. 80 (1929), in which the court assumed the existence of facts sustaining the classification involved; and see *Henneford v. Silas Mason*, *supra*.

The role of the court in cases of this nature is best characterized by the following quotations:

“Nothing can be less helpful than for courts to go beyond the extremely limited restrictions that the Constitution places upon the states and to inject themselves in a merely negative way into the delicate processes of fiscal policy-making. We must be on guard against imprisoning the taxing power of the states within formulas that are not compelled by the Constitution but merely represent judicial generalizations exceeding the concrete circumstances which they profess to summarize.” *Wisconsin v. J. C. Penney Co.*, *supra*, at page 445.

“Hence the familiar rule that, even in jurisdictions where equality is expressly required, the courts will not interfere to grant relief, except in a case where the inequality is the result of a misapplication of the law, or of a wilfull discrimination, or of such gross carelessness as to imply fraud.” *Atchison, T. & S. F. Ry Co. v. Collins, et al.*, *supra*, at page 745.

As pointed out by the Court in *Rivera v. Buseaglia*, *supra*, the cases are few and far between in which a state taxing statute has been ruled unconstitutional on the basis of invalid classification.

To guide the determination of whether the Equal Protection Clause has been contravened by state legislation, this Court has formulated the following general restrictions on the power of classification:

- (1) There must be a rational basis for the classification.
- (2) The segregation of the class cannot be palpably arbitrary, i. e.,
- (3) the classification in question must rest upon some ground of difference having a fair and substantial relation to the object of the legislation or to the public policy of the state.
- (4) All persons similarly circumstanced must be treated alike.

See: *Ohio Oil v. Conway*, *supra*; *Bekins Van Lines, Inc., et al. v. Reiley*, *supra*; *Atchison, T. & S. F. Ry. Co. v. Collins*, *supra*; and *Watson v. State Comptroller of the State of New York*, 254 U. S. 122 (1920).

The foregoing limitations are to be given a very broad construction, a fact evidenced by the preceding discussion. The presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes.

Madden v. Kentucky, 309 U. S. 83, 88 (1940); *Rivera v. Bascaglia*, *supra*, "The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." *Madden v. Kentucky*, *op. cit.* Further, in resolving the question of whether a state taxing law contravenes rights secured by the Federal Constitution, the Court may not depend upon form; construction or definition, but its decision must be based on the practical operation and effect of the tax imposed. *Shaffer v. Carter*, 252 U. S. 37, 55 (1920). As stated in *Wisconsin v. J. C. Penney Co.*, *supra*, at page 443:

"A tax is an exaction. Ascertainment of the scope of the exaction—what is included in it—is for the state court. But the descriptive pigeon-hole into which a state court puts a tax is of no moment in determining the constitutional significance of the exaction. 'In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect.' *Henderson v. Mayor of New York*, 92 U. S. 259, 268. Such has been the repeated import of the cases which only recently were well summarized by the guiding formulation for adjudicating a tax measure, that 'in passing on its constitutionality, we are concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it.' *Lawrence v. State Tax Commission*, 286 U. S. 276, 280." (Italics in original.)

The practical operation of the exaction imposed by Art. 5248, Tex. Rev. Civ. Stat. 1925, as regards differentiation in the tax treatment of lessees of Federal

property and lessees of state owned property, is laboriously detailed above. It must now be determined whether the "natural and reasonable effect" of the different tax treatment is such as to make the classification invidious and discriminatory.

B. The Tax in Question is Not A Discriminatory Exaction From Lessees of Federal Property.

There are essentially two vital questions that must be determined by this Court. The first concerns whether there is a rational basis for according different tax treatment to Federal lessees than is accorded to lessees of state owned property, or, to state the converse, whether the different tax treatment is palpably arbitrary or invidiously discriminatory. The guide posts for decision of this question are set forth above. To paraphrase the language in *Allied Stores of Ohio, Inc. v. Bowlers*, the classification made by virtue of the operation of Art. 5248 within the framework of the Texas property tax exemption structure must be sustained if any reasonable state of facts can be conceived justifying it; and if such facts can be conceived, they will be presumed and the classification upheld.

Assuming that the classification in question is reasonable, this Court must pass on a second question raised by the Appellant, i. e., whether the mere fact that lessees of Federal property are segregated and put into a separate class for the purpose of taxation warrants a finding of unconstitutional discrimination against the Federal Government or those with whom it deals. This question is singularly unique.

By way of preface to the ensuing discussion, the Court's attention is directed to the fact that the Appellant has wholly failed to set forth a specific instance in which state property is leased to private individuals and used for purposes of private gain or profit; in fact, Appellant has failed to show, other than by innuendo, that the State engages in any leasing activity whatsoever. Consequently, the claim of discrimination must fail because the burden of showing that the classification is a hostile and oppressive discrimination against Federal lessees has not been sustained. In actuality, state leasing activities are extremely limited. The bulk of leasing that is done is in the form of oil and gas leases on University land, and, as pointed out above, the interest there created is taxed at its full value to the lessee. Appellants inability to cite any other specific example wherein state property is leased is indicative of the lack of such leasing. The property that is leased is generally let for the purpose of being operated as a public park, fair ground, airport, or for similar purposes. But even assuming that the state's leasing operations are as varied and broad in scope as Appellant would have them appear, the following discussion reflects that there is ample basis for differentiation in tax treatment of Federal and state lessees.

1. The Classification Is Reasonable.

The theory of intergovernmental immunity from taxation is of ancient origin. See *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579 (1819). The fear has been entertained that if one government were to

tax the property of another, conflicts between authorities would frequently ensue. A temptation would exist for one government to overtax the property of the other, and thus to shift upon the shoulders of the taxpayers of that government the burdens properly belonging to its own taxpayers. Taxation by one government of the property of another means, in the final analysis, taxation of taxpayers by an authority not responsible to them. It is, therefore, open to grave abuse. By overtaxing the property of another government, the taxing authority may seriously interfere with the capacity of that government to perform its duties.

These considerations do not persist when one government creates, by lease or contract, property interests in the hands of private individuals. In such a case, the private interests should be made to bear the burden of taxation by the other government in common with all other property interests held by individuals subject to and deriving benefits from the second government.³¹

The exemption by a taxing authority of its own property from its own property tax is also of anci-

In this connection, it has been held that the controlling question in determining the validity of a revenue imposition is whether the state has given anything for which it may ask return. *Northwestern States Portland Cement Co. v. State of Minnesota*, ——— U. S. ———, 79 S. Ct. 357 (1959); *Wisconsin v. J. C. Penney Co.*, 311 U. S. 435 (1940). In the latter case, Justice Frankfurter quotes Chief Justice Holmes as saying a state has given that for which it may ask return "insofar as government is the prerequisite for the fruits of civilization, for which we pay taxes."

ent origin, but is grounded upon completely different principles. From the earliest of times, taxing authorities have recognized that it would serve no useful purpose for them to tax their own property, since by doing so they would not be obtaining any revenue. It is obvious that, in taxing its own properties, an authority would merely be transferring its own money from its general fund to its tax account and from its tax account back again to its general fund. The net result of the transaction would be nil. The burdens on private citizens would neither be increased nor decreased thereby, yet the amount of bookkeeping involved in the transaction would be considerable, and the accounts of the authority would only be confused. It has, therefore, been recognized from the very outset that, in the interest of administrative simplicity, the taxing jurisdiction should exempt its own property from its own tax.

These considerations do persist and are of prime importance in determining whether state property, when leased, should be subjected to taxation in common with all other property in the state. The answer to this question appears conclusively to be in the negative. To subject such property to taxation puts the state in the position of competing with private lessors denuded of favorable economic inducement. Should the leasing of state property be thereby impeded, and the property forced to lie idle and unleased for any period of time, it is obvious that the state's revenue would be directly affected, for, indeed, rent is just as much "revenue" as are taxes. This is a public policy consideration.

of paramount importance, and is, in and of itself, sufficient to justify the classification made in the instant case.

2. The Different Tax Treatment is Compelled and Supported by Consideration of the Fiscal Policy of the State of Texas.

A second consideration is also of compelling importance in sustaining the differentiation in tax treatment. The State of Texas is able to compensate

As pointed out in footnote 26 above, there are several taxing jurisdictions in the State of Texas. It would appear, therefore, that the argument concerning intergovernmental immunity would apply with equal vigor to considerations of one Texas taxing authority taxing the property of another Texas taxing authority. To a certain extent this is true, but it does not follow that private interests created by one Texas authority in its property should be taxed in common with all property within the territorial limits of a second Texas taxing authority. Each Texas taxing authority gets its taxing power from the State Constitution. The amount of property taxes that may be levied, and the uses to which such taxes may be put, are definitely prescribed by the Constitution and by statute. Such purposes are, naturally enough, public purposes, i.e., the revenues must inure to the public benefit. Since, as is pointed out in the discussion at pages 14-15, above, all revenue from the renting of state owned property must inure to the public benefit, or the exemption thereof is lost, it cannot be said that the argument that public policy dictates a favorable inducement to renting of state property is weakened by the fact that such property lies within two or more Texas taxing authorities. The revenue from the leasing must benefit the public interests of all state taxing authorities within which the property is located. Therefore, leasing of such property is a public interest to be fostered by the State, unaffected by the consideration that the property may belong to one state taxing authority and lie within the jurisdiction of another such authority.

any diminution in revenue occasioned by failure to tax property leased to private individuals through adjustment of the lease price. Naturally, this is a factor over which the State has no control when property belonging to the Federal Government is leased. (In reference to this factor, it might be asked: Where, then, is the inducement to leasing considered vital when the lease price approximates the current market value of such lease plus the proportionate burden of taxation that should be borne by the property? The answer to this question is apparent. The plaguing nuisance of annual rendition, assessment, equalization and payment imposed on private property holders in Texas is such that the absence thereof forms a ready inducement to lease.)

What could be the practical use of subjecting state property to the annual process of assessment and collection when the same result, as far as revenue is concerned, is achieved by contract? Obviously the latter procedure comports with administrative simplicity and eliminates cost of assessment and collection, considerations firmly entrenched in the fiscal policy of the State of Texas. Freedom of a state to formulate and pursue its fiscal policy has

This is also a factor over which the State has no control when exempt property of private entities is leased. Therefore, it appears that prohibited discrimination might well result if property of such entities was allowed to be leased without being taxed; consequently, it is here again emphasized that property of exempt private entities, when leased for a purpose not carrying the exemption, is taxed at its fee value to its owner. (See discussion at page 16. above.)

been zealously guarded by this Court. As stated in *Wisconsin v. J. C. Penney, supra*, at page 444:

"For constitutional purposes the decisive issue turns on the operating incidence of a challenged tax. A state is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by the practical operation of a tax the state has exerted its power in relation to opportunities which it has given, to protection it has afforded, to benefits it has conferred by the fact of being an orderly, civilized society."

and as stated by Justice Cardoza in *Henneford, et al. v. Silas Mason, supra*, at page 588:

"True, collections might be larger if the use [that is taxed] were not dependent upon a prior purchase by the user. On the other hand, economy in administration or a fairer distribution of social benefits and burdens may have been promoted when the lines were drawn as they were. Such questions of fiscal policy will not be answered by a court. The legislature might make the tax base as broad or as narrow as it pleased."

It is apparent that the differentiation in the instant case is firmly grounded in Texas fiscal policy, and is supported by practical aspects of revenue-raising. Further, when it is considered that the State can (and, consequently, is presumed to) equate the financial burden on state owned leased proper-

Unless otherwise indicated, all emphasis in this brief is supplied.

ty with taxed property through setting of the lease price, it can be seen that any possible discrimination attendant upon the different tax treatment of Federal and state lessees is completely mollified.

3. The Classification Facilitates The Object of the Amendment to Article 5248, Tex.Rev.Civ.Stat. 1925.

Not only is the classification in the instant case grounded in the public policy of the State of Texas, but the purpose of the enactment of the 1950 amendment to Art. 5248, Tex.Rev.Civ.Stat. 1925, is served thereby. As correctly pointed out in the Appellant's Brief, page 28, the purpose of the amendment was to raise revenue. It was enacted at the first session of the Texas Legislature to convene after the passage of Public Law 364 (The Military

At page 30 of its brief, Appellant briefly propounds the proposition that since Texas is comprised of several taxing jurisdictions, a taxing authority not owning the property is not compensated for loss of taxes by the offset in the lease price. In setting the lease price the State does not figure exactly the market value of the lease, and then add the amount of taxes to which the property would otherwise be subject during the term of the lease. It is not contended that the State obtains anything other than the market value of the lease; but certainly the market value of a state lease is higher by reason of the absence of taxation, and the nuisance of rendition and payment. Of course it will not be an exact mathematical equation, but the loss of all taxes to which the property would otherwise be subject is compensated through fixing of the lease price. This conclusion is not affected by the fact that the leased property is owned by one Texas taxing authority and located within the jurisdiction of another, for the market value is directly affected by the absence of taxes of both authorities; and as pointed out in footnote 32, above, the rental inures to the public benefit of all taxing authorities within which the property is situated.

Leasing Act), and was obviously enacted in response thereto. The decisions of the courts below have established that in the absence of the amendment, the State could not have taxed the interests involved in the instant case.

As pointed out by the case of *Texas Company v. Cohn*, 8 Wash. 2d 360, 112 P. 2d 522, (1941), a state may constitutionally tax one class and exempt other classes if the classification tends in some lawful way to facilitate the raising of revenue. It is submitted that the preceding discussion amply illustrates that the classification in question is lawful, and that it facilitates the raising of revenue.

C. The Fact That Federal Lessees Are Segregated As A Separate Class Does Not, in And of Itself, Make The Classification Invidious or Palpably Discriminatory.

I. There Is No Reason Why Lessees of Federal Property Should Not Be Segregated As A Separate Class.

Assuming the classification in question to have a rational basis (a fact believed amply supported by the preceding discussion) there appears to be no reason whatsoever why Federal lessees cannot be put into a separate classification for the purpose of taxation. As pointed out above, the Fourteenth Amendment requires equal treatment only of all those similarly circumstanced. It does not require (in this case) that all lessees of property exempt from taxation be treated alike, as Appellant contends. Appellant's argument is analogous to the argument put forth in *Watson v. State Comptroller*,

supra. The tax there involved was an additional transfer tax upon investments of a decedent which had escaped taxation during his lifetime. It was contended that the tax was discriminatory because devisees of the same relationship receiving the same type of property were not taxed. The court held the tax to be valid, stating:

“The executors admit, as they must, that a classification is reasonable if made with respect to the kind of property transferred; or, to the amount or value of property transferred; or, to the relationship of the transferees; or, to the character of the transferee, for instance as engaged in charity. . . . [citing cases] But their list does not exhaust the possibilities of legal classification. . . . [citing cases] Any classification is permissible which has a reasonable relation to some permitted end of governmental action. *It is not necessary, as the plaintiff in error seems to contend, that the basis of the classification must be deducible from the nature of the things classified,—here the right to receive property by devolution.* It is enough, for instance, if the classification is reasonably founded in ‘the purposes and policy of taxation’ [citing cases] And what classification could be more reasonable than to distinguish, in imposing an inheritance or transfer tax, between property which had during the decedent’s life borne its fair share of the tax burden and that which had not?”

The Appellant does not contend, as indeed it could not, that it is an agent or instrumentality of the United States Government. The Government has not seen fit to protect Appellant from taxation of

the leasehold interest, which, as pointed out in *James v. Dravo*, is its prerogative. Instead, the interest created by virtue of the lease has been expressly made subject to taxation. Under this state of facts, it cannot be held that a rationally based class must be defeated simply because it contains only lessees of Federal property. To the contrary, as pointed out by the Federal government in its brief (p. 26) in the case of *James v. Dravo*, 302 U. S. 134 (1937):

“... There is nothing in the philosophy of our dual system that requires the state to accord a preferred status to the Federal Government or those who deal with it.”

2. Taxation of the Lease Interest Does Not Interfere With the Functions of the Federal Government.

It is now axiomatic that the fact that the burden of state taxation may incidentally affect or be passed on to the Federal Government does not vitiate the tax. *James, State Tax Commissioner v. Dravo Contracting Co.*, 302 U.S. 134 (1937); *Mason Co. v. Tax Commission of Washington*, 302 U.S. 186 (1937); *Alabama v. King and Boozer*, 314 U.S. 1 (1941); *Esso Standard Oil Co. v. Evans, Commissioner of Finance and Taxation, et al.*, 345 U.S. 495 (1953). As has been repeatedly emphasized, the Federal Government has expressly consented

In line with this proposition, the Justice Department issued a memorandum on June 24, 1938, titled “Taxation of Government Bondholders and Employees,” in which it urged the abandonment of all immunity for private persons dealing with the States or the Nation.

to taxation of Appellant's leasehold interest; this Court has approved taxation of comparable interests where the taxes were measured by the value of the property belonging to the Federal Government. *U.S.A. & Borg-Warner Corporation v. City of Detroit*, 355 U. S. 466 (1958); *United States v. Township of Muskegon*, 355 U. S. 484 (1958); *City of Detroit v. Murray Corporation of America*, 355 U. S. 489 (1958); *Offutt Housing Co. v. Sarpy*, 351 U. S. 253 (1956); *Fort Dix Apartments Corporation v. Borough of Wrightstown*, 225 F. 2d 473 (C. C. A., 3d Cir. 1955) cert. den 351 U.S. 962. Consequently, the proposition that the taxes in question do not constitute a burden upon or interference with the performance of the functions of the Federal Government is deemed so clear and well established as to need no further elaboration. How this conclusion could be altered or changed merely by virtue of the lessees of Federal property being placed in a separate class escapes comprehension.

3. The Case of *Miller v. Milwaukee* Is Not On Point.

Appellant contends that since Chapter 37 of the 1950 Texas Session Laws has as its obvious aim the taxation of Federal lessees, it is special legislation and is discriminatory against such lessees, and for that reason, without more, it is unconstitutional. In

These three cases arose in the State of Michigan and were decided by this Court during the October 1957 term; at various places in this brief these cases are referred to collectively as the Michigan cases, or singularly as the *Borg-Warner* case, the *Continental* case, or the *Murray* case.

support of this proposition, Appellant cites *Miller v. Milwaukee*, 272 U. S. 713. (Appellant's Brief, pp. 8, 12-14).

In *Miller v. Milwaukee*, a statute imposing a tax upon those dividends paid by a corporation to its stockholders out of income not taxable to the corporation was held unconstitutional. The court, finding that the Federal bonds were the most conspicuous instance of tax exempt corporate income, held that the tax constituted an unconstitutional discrimination against such income. The following quotation embodies the reasoning of the court:

"... It is a familiar principle that conduct which in usual situations the law protects may become unlawful when part of a scheme to reach a prohibited result. If the avowed purpose or self-evident operation of a statute is to follow the bonds of the United States and to make up for its inability to reach them directly by indirectly achieving the same result, the statute must fail even if but for its purpose or special operation it would be perfectly good. . . . We think it would be going too far to say that they [the acts of Congress giving immunity to national bonds] allow an intentional interference that is only prevented from being direct by the artificial distinction between a corporation and its members. A tax very well may be upheld as against any casual effect it may have upon the bonds of the United States when passed with a different intent and not aimed at them, but it becomes a more serious attack upon their immunity when they are its obvious aim. In such a case the Court must consider the public welfare

rather than the artifices contrived for private convenience and must look at the facts."

The foregoing illustrates that, in the final analysis, the crux of the decision was that the statute involved constituted a subterfuge or artifice designed to tax indirectly what the state was prohibited from taxing directly. It was only in this respect that discrimination was found."

The distinction between this case, and the instant situation is readily apparent. The State of Texas is taxing only that which it has been given permission to tax, and within limits that have been expressly approved. It cannot be said that such taxation is discriminatory or prohibited as imposing a direct effect upon an incident immune from taxation, and the *Miller* case cannot be cited for such a distorted proposition of law."

"This proposition is clearly illustrated by the more logical concurring opinion of Justice Brandeis, who concurred on the ground that since the United States Congress expressly exempted interest on U. S. bonds from taxation by any state, and a dividend paid directly from such interest is purely within the exemption expressly conferred, the tax in question was void as being violative of that exemption. Justice Brandeis stated:

"I do not think it can be properly said that the state statute discriminates against Government bonds. . .

The operation and effect of the statute would be precisely the same if the dividend had been paid out of any other corporate income exempt from the state tax. . . ."

"The *Miller* case was distinguished by *Pacific Company v. Johnson*, 285 U. S. 480, at page 491. In addition, it has been cited by twelve other cases, but in the dissenting opinion in six of those cases. The most recent instance in which it was cited in a dissenting opinion was in the *Borg-Warner* case, by Mr. Justice Whitaker.

D. In The Michigan Cases, This Court Approved Classification Similar to The Classification Involved In The Instant Case.

Appellant argues that the Michigan cases do not support the conclusion of the Texas Supreme Court in the instant case, stating that such cases are distinguished from the instant case in that the law there involved, i.e., Public Law 189 of Michigan, affected equally all lessees of tax exempt property. (Appellant's Brief, pp. 15-16). In actuality, the differentiation in tax treatment under Public Law 189 is very similar to the differentiation in the instant case. Section 1 of said Public Law 189 (1953) of the State of Michigan, compiled in 6 Mich. Stat. Ann. 1950 (1957 Cum. Supp.), Section 7.7 (5) and (6), reads in pertinent part as follows:

"Section 1: When any real property which for any reason is exempt from taxation is leased, loaned or otherwise made available to and used by a private individual, association or corporation in connection with a business conducted for profit, except where the use is by way of a concession in or relevant to a public airport, park, market, fair ground or similar property which is available to the use of the general public [sic] shall be subject to taxation in the same amount and to the same extent as though the lessee or user were the owner of such property; provided, however, that the foregoing shall not apply to Federal property for which payments are made in lieu of taxes in amounts equivalent to taxes which might otherwise be lawfully assessed or

property of any state-supported educational institution."

Three specific types of property are taken out of the operation of Public Law 189:

(1) Tax exempt property owned by either a private exempt individual organization or by the state or Federal government where the use made by the lessee is by way of a concession in or relevant to the use of a public airport, park, market, fair ground or similar property which is available for use of the general public.

(2) Federal property for which payments are made in lieu of taxes in amounts equivalent to taxes which might otherwise be lawfully assessed.

(3) Property of any state-supported educational institution.

This Court discussed the government's contention that the exemption of the property covered in (2) above rendered Public Law 189 discriminatory. At footnote 6 on page 174 of the decision in *Booth v. Pennsylvania* case, this Court stated:

"The government points to the fact that Public Law 189 creates an exception to the tax on users where payments are made by the United States 'in lieu of taxes in amounts equivalent to taxes which might otherwise be lawfully assessed' as manifesting a purpose to tax government property. But this exemption, which if anything operates in the government's favor, avoids the

possibility of a double contribution to the revenues of the state where private parties use Federal property for their own commercial purposes. Moreover, it is not at all inconceivable that the government might, in one way or another, pass the economic burden of such in-lieu payments to the taxpayers using its property even though he was also compelled to pay the tax imposed by Public Law 189."

This reasoning is peculiarly appropos to the situation at hand. As is pointed out above, the exemption of lessees of state owned property from taxes upon such property avoids a double contribution to the State's revenues, since the State compensates for its loss of revenue by affixing the lease price, thereby passing on to the lessee an economic burden which equates with the lost taxation.

Though the Court emphasized that persons using Federal property are treated no differently from those using property belonging to the state, its political subdivisions, charitable organizations, churches, etc., this language must be viewed in light of the practical operation of Public Law 189. The exception of the other two classes of property named above from the operation of Public Law 189 is not discussed, but the decisions must be considered a tacit approval of such exceptions. When it is considered that under the Texas taxing pattern only the lessees of a restricted type of state owned property are excepted from taxation, it can be seen that the classification created by Public Law 189 is as restricted, and the exemptions from taxation thereunder are as broad, as in the

case at hand. It is submitted that the approval of the exception of property belonging to state-supported educational institutions is direct support for the affirmance of the decision of the court below; and that the approval of the exception of property leased where the use is by way of a concession in or relevant to the use of a public airport, park, market, fair ground, or similar property available to the use of the general public, furnishes support by analogy for excepting from operation of the Texas ad valorem tax property the revenue from which is devoted directly to the public use and benefit of the State of Texas.

Summary of Argument Under Point I:

There is no possibility of discriminatory tax treatment as between lessees of Federal property and lessees of privately held property-exempt from Texas ad valorem taxation. When property of the latter class is leased for a non-exempt purpose, the exemption is lost. The property is then taxed at its entire fee value to its owner; who bears the burden of the taxes as between lessor and lessee is a question controlled by private contract, and is not a matter of public concern.

There is differentiation in the tax treatment of lessees of Federal property and lessees of a restricted class of state-owned property. But in order for state-owned property to remain exempt though leased, (1) the public purpose of the property must not be abandoned, and (2) the revenue from the renting or leasing must be devoted to public purposes. Therefore, it

can be seen that the Texas exemption structure assures that state owned property will at all times be devoted to the public benefit; there is no such assurance as regards Federal property. Consequently, the differentiation in tax treatment is firmly grounded in Texas public policy.

The State of Texas earnestly submits that:

(1) There is a rational basis for the classification in question. It acts as an inducement to leasing of state owned property, a matter of public concern; it makes for administrative simplicity and facilitation of fiscal policy. It also serves to place lessees of Federal property and lessees of state-owned property on substantially the same footing so far as contributions to revenue are concerned. Indeed, lessees of Federal property would be "noticeably favored over their brethern" as stated by the Superior Court of Michigan in the *Continental* case were it not for this equalization.

(2) The differentiation in tax treatment is not invidious or discriminatory. It does not impede or burden the United States in the performance of its functions. Differentiation of tax treatment of comparable scope was tacitly approved in the Michigan cases.

(3) The different tax treatment of lessees of state and Federal property comports with Texas public policy by facilitating fiscal considerations and administrative simplicity.

✓ (4) The differentiation in tax treatment furthers the purpose of the amendment to Article 5248 by facilitating the raising of revenue.

In this case, there is no question but that the Appellant's interest is taxable. It would be extremely unjust to allow the Appellant to escape its proportionate share of the tax burden merely by reason of the slight difference in tax treatment between Federal and state lessees.

II

THE TAX IMPOSED BY ART. 5248, TEX. REV. CIV. STAT. 1925, DOES NOT CONSTITUTE AN AD VALOREM TAX UPON FEDERAL PROPERTY.

A. There is No Impediment, Either in The Federal Constitution or Statutes, to The Enforcement of The Tax.

It is well settled that in the absence of express Federal consent, the property of the United States is exempt from State taxation. *McCulloch v. The State of Maryland, et al.*, 4 Wheat. 316, 4 L. Ed. 579 (1819); *Van Brocklin v. Anderson*, 117 U.S. 151 (1886); *City of Springfield v. U.S.*, 99 F. 2d 860 (C.C.A., 1st Cir., 1938) cert. den. 306 U.S. 650; *American Motors Corp., et al. v. City of Keosha*, 274 Wis. 315, 80 N.W. 2d 363 (1957), affirmed 356 U. S. 21. But the fact that the United States owns an interest in property, or is vested with legal title, does not prevent interests owned

by private individuals in such property from being taxed. See *Baltimore Shipbuilding Co. v. Baltimore*, 195 U. S. 375 (1904); *Northside Canal Co. v. State Board of Equalization*, 8 F. 2d 739 (U.S.D.C. Wyo. 1925), rev'd other grounds, *Northside Canal Co. v. State Board of Equalization of Wyoming*, 17 F. 2d 55, cert. den. 274 U.S. 741; *S.R.A. Inc. v. Minnesota*, 327 U.S. 558 (1946); *Consolidated Uranium Mines v. Moffit*, 257 F. 2d 396 (C.C.A., 10 Cir. 1958); and see *Mocler v. Gormley*, 44 Wash. 465, 87 P. 507, (1906). Any possible impediment to the enforcement of a tax such as the one in question against lessees of Government owned property was removed by Section 6 of the Act of August 5, 1947, c. 493, 61 Stat. 774, (10 U.S.C.A. 1270d), which reads as follows:

"Sec. 6. The lessee's interest, made or created pursuant to the provisions of this Act, shall be made subject to State or local taxation. Any lease of property authorized under the provisions of this Act shall contain a provision that if and to the extent that such property is made taxable by State and local governments by Act of Congress, in such event the terms of such lease shall be renegotiated."

Under authority of this act, which is generally known as "The Military Leasing Act," taxation imposed by various states upon the interests of lessees of Federal property has been expressly approved by this Court. *Offutt Housing Company v. Sarge*, *supra*; *Fort Dix Apartments Corporation v. Borough of Wrightstown*, *supra*; *U. S. A. and Borg-Warner Corporation v. City of Detroit*, *supra*; *United States* :

v. Township of Muskegon, supra; and *City of Detroit v. Murray Corporation of America, supra*.

The contract between the United States and the Appellant contemplates the imposition of taxes such as are involved in the instant case. Condition (Section) 29 of the lease contract between the Appellant and the United States Government states:

“That the Lessee shall pay to the proper authority, when and as the same become due and payable, all taxes, assessments, and similar charges which, at any time during the term of this lease, may be taxed, assessed, or imposed upon the Government or upon the Lessee with respect to or upon the Leased Property.” (see R. 76).

The Senate Committee report on the portion of the leasing act quoted above states in part as follows:

“Section 6 provides that the interest a lessee holds under this act shall be subject to State or local taxes. In the event of States, not presently having legislation permitting the taxing of such property, enacting such laws subsequent to the negotiation of a lease under this act, this section provides that the lease can be renegotiated.” Senate Report No. 626, July 19, 1947; 1947 U. S. Code, Cong. Serv. 1593.

It is clear that the Federal Government contemplated that direct property taxes would be levied upon the leasehold interests created under the Military Leasing Act, and that the scope of consent to taxation includes such taxes.

B. The Tax is Not Levied Upon Property Belonging to The United States.

In determining whether a tax is actually laid on the United States or its property, this Court has consistently gone behind the face of the taxing statute to view its practical operation. See *U.S.A. & Borg-Warner Corporation v. City of Detroit*, 355 U.S. 466 (1958); *City of Detroit v. Murray Corporation of America*, 355 U.S. 489 (1958). The tax involved in the instant case is an ad valorem tax levied upon and assessed against the leasehold interest of the Appellant and is collectible solely from the Appellant. This point was made clear in the original trial, and was stressed in the opinions of both the Court of Civil Appeals and the Supreme Court of Texas (R. 114, 133, 149, 152, 169, 181). The tax is upon Phillips' property interest, or right of use, in the property, and is Phillips' personal obligation. The United States is not liable for the tax, and cannot be made responsible for payment of the tax to the School District.

Denominating the tax "ad valorem" does not make it an exaction upon Federal property. See *Consolidated Uranium Mines v. Moffitt*, *supra*; *City of Detroit v. Murray Corporation of America*, *supra*. In the latter case the court stated:

"We see no essential difference in so far as constitutional tax immunity is concerned between taxing a person for using property he possesses and taxing him for possessing property he uses when in both instances he uses the property for his private ends. . . ."

In the *Consolidated* case, the court said:

"In respect to mining claims, it was the clear intent of the legislature to authorize a tax upon the possessory right to explore and develop mines under existing laws and regulations applicable thereto. These assessments against the mining claims were limited to the possessory right to explore and develop the premises for mining purposes. They were not against the title or fee of the United States in the land, either under the five-dollar per acre provision in the statute, or otherwise. And a tax—*whether denominating value, occupation, use, gross proceeds or otherwise*—imposed under state law upon the possessory right to explore and develop mines located on land belonging to the unappropriated public domain of the United States is not open to challenge upon the ground that it constitutes a tax against property belonging to the United States.

The foregoing quotations clearly illustrate that regardless of the name appended to a tax, its validity is to be determined from the practical operation and incidence of the exaction.

The contention that the tax in question is upon Federal property because measured by the value of such property is likewise untenable. As is reflected by the record (R-29) the Board of Equalization of the Dumas Independent School District received voluminous testimony in setting the value of the leasehold interest. The fact that such value as assessed coincided with or was the same as the fee value is no defect. (See the cases cited in the suc-

ceeding section.) It is not strange or unreasonable that Appellant should pay a tax based upon the value of the property. During each year for which it has been assessed and for which it may be assessed it has had and will have all of the rights of ownership without the other burdens thereof. Requiring Appellant to pay a tax based upon the value of the property is a practical, just, fair and equitable method of taxing the right of exclusive use of the property during each taxable year. As pointed out by the Texas Court of Civil Appeals, the Appellant certainly has a valuable right in the use of the Government property since it pays \$1,026,666.67 annually for the right to use such property. This court aptly stated in the *Borg-Warner* case, "... it seems obvious enough that use of exempt property is worth as much as use of comparable taxed property during the same interval . . ." 355 U.S., p. 470.

C. The Michigan Cases Furnish Direct Authority For Sustaining The Tax.

In the Michigan cases, as in *Offutt Housing Co. v. Sarpy*, *supra*, and *Fort Die Apartments Corporation v. Borough of Wrightstown*, *supra*, taxes directly similar to the tax here in issue were upheld, even though measured by the fee value of the property. In the *Borg-Warner* case, the tax upheld was imposed under Michigan Public Law 189 on a lessee's right of use of Federally owned property, and was measured by the value of the demised premises. The *Continental* case involved substantially the same issues, except that the property was held under

permit and not under lease. Certainly, in these two cases the right of use was no greater, the duration of the permitted use no longer, and the taxes no heavier than in the case at hand; but, admittedly, this Court styled the taxes "use" taxes, which might serve to distinguish these cases from the instant case, though the line of difference would be thin and one of form and definition only. However, any void that is left by these cases in furnishing direct authority for the sustention of the tax in question is filled by the *Murray* case.

In the last named case the tax involved was not levied under Michigan Public Law 189, as was the taxes in the *Borg-Warner* and *Continental* cases, but was assessed pursuant to an ad valorem tax statute, and was measured by the full value of the property. In upholding the tax against the claim that it was upon Government property, this Court stated:

"It is true that the particular Michigan taxing statutes involved here do not expressly state that the person in possession is taxed 'for the privilege of using or possessing' personal property, but to strike down a tax on the possessor because of such verbal omissions would only prove a victory for empty formalisms and empty formalisms are too shadowy a basis for invalidating state tax laws. Cf. *Henneford v. Silas Mason Co.*, 300 U.S. 577, 582. In the circumstances of this case the State could alleviate such grounds for invalidity by merely adding a few words to its statutes. Yet their operation and practical effect would be precisely the same."

Similarly, in the instant case, the practical effect of the tax would be precisely the same whether denominated an ad valorem, use, or other type of tax. And invalidating the tax because called "ad valorem" would indeed prove a victory for empty formalisms.

Appellant would distinguish the *Murray* case on the ground that the Michigan statute authorized imposition of the tax involved against the possessor of the property, a fact alluded to in the opinion of the Court. But it goes without saying that the decision was not rested upon this point, for certainly the fact that a tax is authorized to be assessed against the possessor of property does not allow the imposition of ad valorem taxes directly on property exempt to its owner. See *United States v. Allegheny County, Penn.*, 322 U. S. 174 (1944); *Miller v. Milwaukee*, *supra*. It is apparent that the crux of the decision is that the right of possession and use created in the lessee is a sufficient interest to sustain the imposition of a tax measured by the value of the property belonging to the Government; it does not matter whether that right of possession and use be denominated, or taxed, as a property interest, or as a "privilege" or "use."

Appellant also argues that the tax in question is upon Federal property because such property is subject to a lien. Liens for the enforcement of Texas ad valorem taxes are provided in Article 7172, Tex. Rev. Civ. Stat. 1925:

"All taxes upon real property shall be a lien upon such property until the same shall have been paid. And should the assessor fail to assess any real estate for any one or more years, the lien shall be good for every year that he should fail to assess for; and he may, in listing property for taxes any year thereafter, assess all the back taxes due thereon, according to the provisions of this title."

It is clear from a reading of this article that the lien created is against the property or interest taxed, in this case the Appellant's leasehold interest. It cannot be enforced so as to interfere with possession of the United States Government. See *United States v. Allegheny County*, *supra*; *S. R. A. v. Minnesota*, *supra*; *Consolidated Uranium Mines v. Moffitt*, *supra*. The fact that the lien attaches to the leasehold interest, and that such interest might conceivably be made the subject of a tax sale, does not render the tax invalid, since the title of the United States to the property would in nowise be thereby affected. This proposition was expressly decided in *S. R. A. v. Minnesota*, *supra*; and see *Consolidated Uranium Mines v. Moffett*, *supra*.

In furtherance of the attempted distinction of the *Murray* case, Appellant argues at pp. 39-40 of its brief that the tax imposed by Art. 5248, Tex. Rev. Civ. Stat. 1925, is "simply and forthrightly" laid on property of the Federal Government by virtue of the operative language of said Article.⁴⁰ This contention was

⁴⁰In this same vein, at page 49 of its brief, Appellant states that in order for the School District to validly impose the tax in question, the Texas Constitution must be amend-

disposed of by the decision of the Texas Supreme Court, wherein it was stated:

“We agree that it was the intention of the Legislature, in amending Article 5248 to make the value of the entire property belonging to the United States Government, if *used and occupied by private business and operated for profit*, taxable to such user and operator.” (R. 181; italics in original.)

In construing the Article thusly, the Court below, without expressly so stating, invokes two principles of statutory construction so well established as to need no citation of authorities, i. e., (1) that construction must be given a statute which is consistent with its constitutionality, and (2) the legislature will be presumed not to have done a vain thing. The Texas Legislature was most certainly aware that it could not tax Federal property, a fact evidenced by two separate statutory exemption provisions (Art. 5248, Art. 7150, Sec. 4. Tex.Rev.Civ.

ed, since the District is permitted only to lay ad valorem taxes. This argument reaches the insupportable result that ad valorem taxes cannot be levied on property interests created by lease or conveyance of less than the fee, but must be levied against the owner of the fee. The contrary of this proposition is so well settled as to need no discussion. See Art. 7173, Tex.Rev.Civ.Stat. 1925, and *Big Lake Oil Co. v. Reagan County*, discussed *supra*; and see *Jett v. Kahn*, 273 S.W.2d 431 (Tex.Civ.App. 1954, *error ref'd.*, N.R.E.); *Sheffield v. Hogg*, 124 Tex. 290, 77 S.W.2d 1021 (1934); *Tennant v. Dunn*, 130 Tex. 285, 110 S.W.2d 53 (1937); *Hydrocarbon Production Company v. Valley Acres Water District*, 204 F.2d 212 (C.C.A., 5th Cir. 1953), cert. den. 346 U.S. 825; *Downman v. The State of Texas*, 231 U.S. 353 (1913).

Stat. 1925); by enacting the amendment to Art. 5248 on the heels of the passage of the Military Leasing Act, the Texas Legislature left no question but that it was imposing a tax only upon the interests to which express consent for taxation had been given.

From the preceding discussion, it can be seen that the tax in issue is not a tax upon Federal property, and that there is virtually no distinction, factual or legal, between the case in question and the *Murray* case. The reasons set forth in the latter case compel the conclusion that the tax upon the Appellant must be upheld.

D. The Allegheny Case is Not Controlling.

In urging that the tax here in question is an ad valorem tax upon Federal property, Appellant relies entirely upon the case of *United States v. Allegheny County*, cited *supra*. In assuming this position, the Appellant rests upon a perch that has had many prior occupants. The Appellants in the Michigan cases, and in *Esso Standard Oil Co. v. Eans, Commissioner of Finance and Taxation, et al.*, 345 U. S. 495 (1953), relied upon the *Allegheny* case, with singular lack of success. The applicability of the case has been severely limited. The theory applied to the facts, as viewed by the Court, i. e., that the tax constituted a tax upon property of the Federal Government, is undoubtedly correct. But each of the above named cases have been distinguished on the facts, and the tax found not to be imposed on property belonging to the U. S. It is submitted that the pre-

ceding discussion evidences that the facts in this case are equally distinguishable, and come within the express reservation of the *Allegheny* case described at p. 50 of Appellant's Brief.

This Court in the *Murray* case strongly implies that the *Allegheny* case is out of step with the trend of decisions and has no meaningful vitality. Certainly, if the doctrine of this case were extended so as to prohibit the taxation of interests owned by private individuals simply because measured by the value of property belonging to the United States, it would be in direct conflict with the Michigan cases and the principle established in *Werner Machine Co., Inc. v. Director of Taxation, Department of the Treasury of New Jersey*, 350 U. S. 492 (1956), and *Society for Savings v. Coite*, 6 Wall. (U. S.) 594 (1867).

Summary of Argument Under Point II:

The scope of consent to taxation embodied in the Act of August 5, 1947, c. 493, 61 Stat. 774 (10 U. S. C. A. 1270-1270d) includes taxes of the nature imposed by the Dumas Independent School District; the imposition of such taxes was in the contemplation of both the Appellant and the United States when the lease between them was executed. There is no question but that Appellant's interest in the property is taxable; to allow it to go untaxed would place the Appellant in an unjustified, favored position, and would result in the Appellants receiving the benefits of property ownership and government protection free from the burden of taxation ordinarily attendant thereon.

The tax in issue is not a tax upon Federal property. It is a tax upon the Appellant's leasehold interest, or right of use, in such property, and is his personal obligation. The United States is not liable for the tax and cannot be made responsible for its payment. Nor can the property belonging to the United States be made the subject of a lien. The fact that a lien attaches to the leasehold interest and that such interest might conceivably be made the subject of a tax sale does not render the tax invalid, since the title of the United States to the property would in no wise be thereby affected.

Denominating the tax "ad valorem" does not make it a tax upon the property of the Government; nor does the fact that it is measured by the value of the Federal property render it invalid. These propositions were firmly established by the *Murray* case, which, along with the other Michigan cases, furnishes direct support for sustaining the decision of the Court below.

The case in issue is distinguishable from the case of *United States v. Allegheny County*. The facts here involved are within the express reservation of the *Allegheny* case. The Dumas Independent School District has not attempted to impose a tax on Federal property, but has sought only to tax the lessees interest, for which permission has been given by the United States Government.

Conclusion

Art. 5248, Tex. Rev. Civ. Stat. 1925, as amended by Ch. 35, Tex. Sess. Laws, 1950, 51st Leg., 1st C. S.,

does not constitute a tax upon Federal property, and does not unconstitutionally discriminate against the United States Government or its lessees. The classification created by virtue of the operation of Art. 5248 within the Texas property tax exemption structure is reasonable, and is within the State's power to identify and classify subjects of taxation. The judgment of the Texas Supreme Court should be affirmed.

Respectfully submitted,

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October, 1958.

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SUPREME COURT, U. S.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1959

No. 40

PHILLIPS CHEMICAL COMPANY, A Corporation,
Appellant,

v.

DUMAS INDEPENDENT SCHOOL DISTRICT

On Appeal from the Supreme Court of the State of Texas

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No. 40

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DE MAS INDEPENDENT SCHOOL DISTRICT

On Appeal from the Supreme Court of the State of Texas

REPLY BRIEF FOR APPELLANT

1. It is admitted in the *amicus curiae* brief of the State of Texas (T. Br., pp. 18, 20)¹ and the brief of Appellee School District (D. Br., pp. 4, 13) that the taxability of leasehold interests in exempt lands, other than Federal is still governed by the provisions of Articles 7173 and 7174, which are less burdensome than those of Chapter 37 applying to lessees or users of Federal property.

¹ For simplicity, the School District's brief will be referred to as "D. Br." and that of the State as "T. Br."

See also Motion of Appellee to Dismiss, p. 9.

As shown in our main brief (at pp. 16-21), under the Texas taxing system lessees of Federal property are the only lessees of tax-exempt property who are required to pay taxes measured by its full fee value. *Daugherty v. Thompson*, 71 Tex. 192; *Trammell v. Faught*, 71 Tex. 557, and other decisions of the Texas Supreme Court have established that under Articles 7173 and 7174 a lessee of non-Federal tax exempt property is not required to pay any taxes if his lease is for less than three years. If his lease is for more than three years, the lessee is required to pay a tax measured solely by the value of his leasehold interest.

That Articles 7173 and 7174, as construed in *Daugherty v. Thompson* and *Trammell v. Faught*, are controlling law in Texas as to the taxing of leases of non-Federal exempt property is also manifest from the official opinions of the Attorney General of Texas.² Thus, in his Opinion No. WW-270, dated October 7, 1957 (App., pp. 24-26) which involved the taxability of the leasehold estate of W. T. Grant Company in property owned by the University of Texas, the State Attorney General quoted the text of Article 7173 and pointed out that this statute was construed in *Trammell v. Faught*, *supra*, as meaning:

"If appellant has held the land under an absolute lease for a term of three years or more, his leasehold estate would have been subject to tax."

At the same time that the School District urges that Chapter 37 must be viewed in the context of the entire Texas taxing system (D. Br., pp. 7-8, 51-52), it fails to abide by its own admission. Instead, it omits all discussion of the part played in the taxing system by Articles 7173 and 7174.

For the convenience of the Court, we have reproduced the relevant opinions of the State Attorney General in an appendix to this brief.

ation upon such value as if would bring at a fair voluntary sale for cash, but he would not be liable to taxes upon the value of the freehold estate in the lands." (App., p. 25)

The State Attorney General went on (*ibid.*):

"Our research does not reveal that this ruling of the Supreme Court has been departed from. Article 7174 V. C. S. provides how such leasehold shall be valued. This statute provides in part, as follows:

'Taxable leasehold estates shall be valued at such a price as they would bring at a fair voluntary sale for cash.'

"You are, therefore, respectfully advised that the leasehold estate of W. T. Grant Company in the real property in question is subject to ad valorem taxes and the value should be ascertained as provided in Article 7174, V. C. S."

The State Attorney General expressed the same views in his Opinion No. WW-284, dated October 17, 1957 (App., pp. 26-32), which concerned, *inter alia*, the taxability of a lease of property by the City of Lubbock to West Texas Compress and Warehouse Company.

Although, as shown in our main brief (pp. 20-21, App. A, pp. 4a-4b), even greater discrimination against Federal lessees would result if Articles 7173 and 7174 can be regarded as "no longer controlling", the forthright admission by the Attorney General of Texas that leasehold interests in non-Federal exempt property are in fact taxable under Articles 7173 and 7174 brings into clear focus the disparity in tax treatment accorded Federal and non-Federal lessees. The discrimination against Federal lessees is patent. In

view of this, the holding of the four dissenting justices of the Texas Supreme Court appears to furnish an appropriate basis for the decision of this Court.

2. The School District also urges that Federal lessees are not in fact subjected to higher taxes than lessees of other tax exempt property because non-Federal exempt property "normally loses its exemption from taxation when not owned and used exclusively for the exempt purpose." (D. Br., p. 4) "Even the property of state and local governments loses its exemption when it is not owned and held for public purposes." (D. Br., p. 15) These statements do not present an accurate picture as to the status of otherwise exempt property when leased for non-exempt use.

As to property owned by the State itself it is clear that such property cannot be subjected to state, county or local taxes in any shape, manner or form without statutory consent. This is inescapably so because the State cannot tax itself and its political subdivisions lack the organic power to do so. The creatures of the State cannot tax their creator.

The State's brief recognizes that property belonging to its *political subdivisions* may be leased for a non-exempt use without destroying its exemption (T. Br., p. 14). Texas law requires that the revenue from such a lease, not the property itself, be used for public purposes. Thus, under Texas law, exempt property leased for commercial purposes retains its exemption as long as the ultimate public purpose of the property is not abandoned, and the revenue from the lease inures to the public benefit (T. Br., pp. 14-15).

These principles, which have been established by the cases cited in our main brief (App. B, p. 5a), have been applied by the Attorney General of Texas in his official opinions. In an opinion dated December 9, 1958 (Opinion No. WW 531, App., pp. 17-23), subsequent to the decision of the Texas Supreme Court in the case at bar, the State Attorney General ruled that numerous buildings originally a part of PanTex Ordnance Plant, deeded by the Federal Government to Texas Technological College, and rented by the College to Phillips Chemical Company and others for private use, remained tax exempt to the College (App., p. 22):

"The exemption awarded to 'public property used for public purposes' is not lost even though such property may be temporarily leased or rented, so long as the public purpose of the property has not been abandoned, and so long as the revenue from such renting or leasing inures to the public benefit. *State v. City of Beaumont*, 161 S. W. 2d 344 (Tex. Civ. App. 1942, no writ history); *City of Abilene v. State*, 143 S. W. 2d 631 (Tex. Civ. App. 1938 Error Dismissed)."

Clearly, therefore, Texas law does not require exempt property of a political subdivision to be used only for a public purpose in order to retain its exemption. The exemption is retained even if the property itself is leased to a private person or corporation for a commercial purpose as long as the owner in

To the same effect see also Opinion No. WW 281 dated October 17, 1957 (App., pp. 26-32).

As pointed out above, property owned by the State retains its exemption regardless of the character of its use or the purpose for which it is leased.

private persons or corporations for profit is not uncommon in Texas as is evident from the court decisions cited in our main brief (Appx. B, p. 5a) and the appended opinions of the State Attorney General dealing with problems arising in connection therewith.

Moreover, there are a number of Texas statutes which specifically authorize leasing of wide categories of exempt property. These include:

Airports and airport facilities (Article 4641 *et seq.*)

Airport property including such lands and improvements necessary to assemble or manufacture military or naval aircraft (Article 4209)

Wharves, docks, warehouses, grain elevators, bunkering facilities, belt railroads, and other harbor facilities (Articles 8247a, b, and c)

Municipal fish markets, including facilities for cleaning, canning, and cold storage of fish (Article 4487c)

Islands, flats, or submerged lands (Article 4669a)

Facilities on reconstructed or reclaimed land (Article 4487a)

Also, it is to be noted that the State has the right to lease its lands, as the Supreme Court has held, "to the public or to private individuals." *Bethel v. State*, 100 Tex. 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

Parking garage and retail establishments in State office building (Article 678c)

Housing authority properties (Article 1269k)

Public grounds belonging to the State of Texas under the charge and control of the State Board of Control (Article 666a)

Any unsold land in the public domain (Article 5334)

Property used for pumping stations, loading racks, electric sub stations and tank farms (Article 6020a)

Property owned or controlled by any state agency where not otherwise prohibited (Article 2022zz 1, Section 5)

It is clear from these examples that the State of Texas and its myriad political subdivisions own and are authorized to lease extensive properties for private and commercial use which may greatly exceed in value the Federal property available for lease in Texas.

4. Seeking to divert this Court from the fact that Federal lessees are required to pay higher taxes than those assessed against lessees of other exempt property, the School District reiterates throughout its brief that the taxes upon Federal lessees should be compared only with the taxes paid directly or indirectly in the form of rent by lessees of non-exempt property.

The *Michigan* cases, however, make it clear that to avoid unconstitutional discrimination the taxes imposed upon Federal lessees must be no more onerous than those imposed upon lessees of *exempt* as well as

of non-exempt property." This is implicit in the reference in the Court's opinion in *Borg Warner* to the fact that "here the tax applies to every private person who uses exempt property in Michigan in connection with a business conducted for private gain." 355 U. S. at 473. It is explicit in the separate opinion of Mr. Justice Harlan, (355 U. S. at 507):

"* * * The state taxes here * * * do not operate in a discriminatory fashion by so measuring the tax on use or activities as to impose an unequal tax burden on lessees or users of government property *vis-a-vis* lessors, users or owners of other tax exempt or non-exempt property." (Italics supplied)

In this connection, both the School District (D. Br., p. 28) and the State (T. Br., pp. 40-41), pointing to the fact that the Michigan statute in *Borg Warner* excepted certain properties from its coverage (see 355 U. S. at 367, fn. 1), urge that this Court could not have intended to hold that Federal lessees may not be taxed more than lessees of other exempt property.

The scope of the exceptions in the Michigan statute is very limited, however, as compared to the vast properties which under Texas law retain their tax exemption when used for private purposes and profit.

Even as compared to lessees of non-exempt property, Phillips is placed in an unfavorable position by Chapter 37 because the annual rental which it agreed to pay assumed the non-taxability of the Federal Government's interest in Cactus Ordnance Works. R. 76. The Government retained the benefit of its tax exemption and did not pass it on to Phillips. See Hearings before Subcommittee No. 3 of the House Armed Services Committee, 80th Cong., 1st Sess., on H. R. 3471 at pp. 2353, 2354. Hearings before the Senate Armed Services Committee, 80th Cong., 1st Sess., on S. 1198, H. R. 3471 at pp. 27, 28-32.

Moreover, the Court in *Borg Warner* patently understood the exceptions to apply only to the property which actually was being used for public purposes. Only such an understanding can be reconciled with the Court's statement that the Michigan statute applied to "every person who uses exempt property *in connection with a business conducted for private gain.*" (355 U. S. at 473) (Italics supplied)

5. Both the School District (D. Br., pp. 27-33) and the State (T. Br., pp. 21-34) contend that the more onerous tax imposed upon Federal lessees is not unconstitutional because the States have power to classify reasonably the various objects of taxation and that the separate classification of Federal lessees here has a reasonable basis.

In our main brief (at pp. 22-27), we have shown that the classification power of the States is insufficient to support a statute imposing heavier taxes upon persons dealing with the Federal Government than those imposed upon persons dealing with the States. Moreover, neither of the justifications advanced by the State of Texas constitutes a reasonable basis for classifying Federal lessees separately.

The State suggests that the classification is appropriate because

"To subject (State) property to taxation puts the state in the position of competing with private lessors denuded of favorable economic inducement. Should the leasing of state property be thereby impeded, and the property forced to lie idle and unleased for any period of time, it is obvious that the state's revenue would be directly affected, for, indeed, rent is just as much 'revenue' as are taxes." (T. Br., p. 29)

But far from supporting the separate classification of Federal lessees, this asserted justification graphically illustrates the reason Federal lessees cannot be required to pay heavier taxes than lessees from the State. If the leasing of State property is impeded by the lack of favorable economic inducements, the effect of the decision below would plainly impede the leasing of Federal property even more since it places Federal lessees at a disadvantage compared to lessees from the State.

Equally without merit is the State's further justification that there is no "practical use of subjecting State property to the annual process of assessment and collection when the same result, as far as revenue is concerned, is achieved by contract." (T. Br., p. 31)

Apart from the fact that this argument is inconsistent with the State-advanced argument just discussed, this asserted justification is erroneous. What ever validity this rationalization might have if no taxes were imposed upon State lessees and therefore none need be assessed and collected, it is established that lessees of tax exempt property for absolute terms of three years or more must pay taxes upon the value of their leasehold interest. Although the tax assessed is measured solely by the value of the lessee's interest (Article 747b), the fact remains that taxes are assessed and collected from such lessees of exempt property. It is difficult to see how imposing more limited taxes upon lessees from the State than those imposed upon Federal lessees "comports with administrative simplicity and eliminates costs of assessment and collection * * * " (T. Br., p. 31)

Finally, contrary to the State, the same result, *i.e.*, taxing State lessees at full fee value, is clearly not

achieved by contract when the matter is considered in the context of the actual situation prevailing in Texas. As noted in our main brief (at App. B, p. 76), the taxing authority in Texas is subdivided among the State and its numerous political subdivisions. Consequently, since the taxing authority is frequently a political subdivision separate and distinct from the landlord receiving the full rental, the taxing authority receives no offset in rental to compensate for the lower taxes paid by the lessees of such exempt property.¹¹

6. Both the School District (D. Br., p. 2) and the State (T. Br., p. 1) suggest that Phillips misstated the facts when it stated that property owned by the Federal Government was placed upon the tax rolls in the name of Phillips Chemical Company. The accuracy of Phillips' statement is supported by the official acts of the School District as shown by the assessment sheets (R. 92, #, R. 109), tax rolls (R. 111-119), and tax statements (R. 161-162).

For example the assessment sheets read (R. 109-110):

Owner Phillips Chemical Company

All of the following described realty, commonly known as Cactus Ordnance Works, includ

1. School District (D. Br., pp. 25-26) and the State (T. Br., p. 1) argue that, despite the various taxing authorities, it is not fair to tax the lessees of exempt property since all property tax and rental really ends up in the same place. If that were the case, there would be no reason for the various statutory provisions exempting certain properties owned by the State and its political subdivisions to taxation, or whole or in part, by the various taxing authorities. It would also make it difficult to understand why taxing authorities have not attempted to tax property owned or leased by other political subdivisions. See pages 10-11, 14-15 at App. B, p. 50.

ing buildings, improvements, fixtures, machinery, and appurtenances thereto belonging, and more particularly described as follows, to wit:

(Legal Description of Property Omitted)

"Total value of the above described realty, including buildings, improvements, fixtures, machinery and appurtenances thereto belonging.

7. Both the School District (*D. Br., c.g., p. 39*), and the State (*T. Br., c.g., p. 6*) recognize that the tax here involved is an ad valorem tax. Nevertheless they contend that the tax is not an unconstitutional ad valorem tax upon Federal property even though the amount of the tax is measured by the full fee value of the property.

They urge that the tax here is constitutionally valid under the authority of Section 6 of the Act of August 5, 1947 (*T. Br., p. 46; D. Br., pp. 49-50*). But that statute authorizes only the taxing by the States of "the lessees' interest." The only interest which Phillips has in the Cactus Ordnance Works and which could be subjected to taxation under an ad valorem tax system is its leasehold interest.

An ad valorem tax as distinguished from a use tax is assessed traditionally only upon interests in property as such. Since the tax here involved is in fact an ad valorem tax, the imposition of such a tax measured by the full fee value of the property in effect taxes the entire interest in the property. Inasmuch as Phillips owns only a leasehold interest in the property and the Federal Government owns the remainder, the tax here is upon the fee interest of the Federal Government as well as the interest of Phillips. Conse-

quently, this tax not only goes beyond the limited consent contained in the Act of August 5, 1917, but it is imposed upon Federal property without any Congressional consent.

The State (T. Br. p. 48) further argues that the tax, although *ad valorem* of property, is valid as a "tax upon Phillips' property interest, or right of use, in the property." . . . In the same vein, the School District (D. Br. p. 39) contends that "the right and privilege of use and occupancy is a property right, and may be subject to *ad valorem* taxation."

These arguments ignore the historical difference between use and *ad valorem* taxes. As far as we have been able to ascertain, *ad valorem* taxes have never been imposed upon the right or privilege to use property. To permit the taxing of the right to use property by way of *ad valorem* taxation would destroy the established distinction between these two very different kinds of taxes.

The School District (D. Br. pp. 42-43) argues that this Court in the Michigan cases has already destroyed the distinction between use and *ad valorem* taxes. It argues further, that if the distinction still survives, the Court should now hold that it is no longer valid. In our opinion, at pp. 46-49, we have shown that the Michigan cases have nothing to do with the distinction. While the surrounding circumstances in the Michigan cases left the way open for construing the taxes there involved as valid *ad valorem*, the limitations imposed by the Texas Constitution preclude the construction of these taxes as anything other than *ad valorem* taxes. The School District has advanced no reason for advocating the elimination of the distinction other than its desire to preserve Chapter 37 from

invalidation. Such desire is insufficient to justify the amalgamation of these two types of taxes.

CONCLUSION

For these reasons and those set out in our main brief, it is respectfully submitted that Chapter 37 of the 1950 Texas Session Laws is unconstitutional and that the judgment of the Texas Supreme Court holding to the contrary should be reversed.

Respectfully submitted,

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Bartlesville, Oklahoma

Attorneys for Appellant,

Phillips Chemical Company

November 14, 1959

APPENDIX

THE ATTORNEY GENERAL OF TEXAS
 AUSTIN, TEXAS

Will Wilson
 Attorney General

December 9, 1958

Opinion No. WW 531

Re: Whether certain property owned by Texas Technological College in Carson County is exempt from taxation under the laws of the State of Texas.

Mr. E. N. Jones, President
 Texas Technological College
 Lubbock, Texas

Dear Mr. Jones:

We quote from your opinion request as follows:

"Your opinion is respectfully requested as to whether certain property owned by Texas Technological College in Carson County is exempt from taxation under the laws of the State of Texas.

"The property was originally the PanTex Ordinance Plot and was deeded by the Federal Government to Texas Tech on April 1, 1949 by deed without warranty for the purpose of educational utilization. The deed contained a recapture clause in event of a national emergency.

"During the Korean emergency in 1951 and 1952, the Government exercised the recapture clause and recaptured approximately 10,000 acres of the 16,000, with improvements, originally deeded to the College. A period of negotiations began and culminated in the instruments dated August 19, 1955 which have been sent to your office.

It is contemplated that as the educational program expands, this property will be used in connection therewith and is being held for the purpose.

PROPERTY OWNED OR CONTROLLED BY TEXAS TECH

This property is owned outright by Texas Tech, having been received from the United States Government for use as a government laboratory agency. The majority of the property is owned by Phillips Chemical Company, the station is composed of Phillips rents, three which are on a five year lease and 7 rents one hundred and two (102) plots on an as needed basis, paying only for the plots actually needed. Certain staff residences located on this property are rented on a long term basis for a month to a year. Certain buildings located here and more than 100 and 100 acres of land are owned by Carson College, Texas Tech, as the land under which the building is located is owned by the State of Texas.

The income from the above said properties is credited to the Phillips Account and is used for the promotion of the educational program at Phillips Chemical Company. The State of Texas has the right to require that the property be used as part of the Phillips Account of various payments to the Phillips Chemical Company, but is not bound by such a requirement.

The State of Texas is a party to the agreement between the State of Texas and the Phillips Chemical Company, which is a party to the agreement between the State of Texas and the Phillips Chemical Company.

PROPERTY OWNED OR CONTROLLED BY TEXAS TECH

Article 8, Section 2 of the Texas Constitution contains the following language:

"The legislative power is extended to laws, except from taxation public property used for public purposes."

poors, and all buildings used exclusively and owned by persons or associations of persons for school purposes.

The provisions of the aforesaid Article are permissive and not mandatory. Pursuant thereto, the legislature enacted Article 7469, Texas Revised Civil Statutes, the salient provisions of which read as follows:

"The following property shall be exempt from taxation, to-wit:

"1. Schools and churches; Public school houses;

"2. All public colleges, public academics, and all endowment funds of institutions of learning and religion not used with a view to profit, and when the same are invested in bonds or mortgages, and all such buildings used exclusively and owned by persons or associations of persons for school purposes;

"3. All property, whether real or personal, belonging exclusively to this State, or any political subdivision thereof."

GENERAL PRINCIPLES.

The exemption of property used for school purposes extends to private schools as well as public schools. *Cass v. State*, 10 Tex. 664 (Tex. 673, 1823). However, the exemption accorded private schools is more restrictive than the exemption given to public school houses, public colleges and public academics. Chief Justice Stayton indicated this distinction in the case of *St. Francis College v. Harris*, 140 Tex. 512 (Tex. Sup. Ct. 1921).

In reference to the exemption from taxation of property when used exclusively and owned by persons or associations of persons for school purposes,

the statute simply repeats the language of the Constitution which permits the exemption to be made; thus indicating an intention to make the exemption in such cases more restrictive than is the exemption when given to public school houses, public colleges and public academies. The Constitution, as well as the statutes, make the distinction between public property and private property owned and used for school purposes

Texas Technological College was created and is governed by the laws of the State of Texas. It is a public college. Its property is public property of the State of Texas, and is held by Texas Technological College as an agency of the State of Texas. See *State v. University at Houston*, 264 S.W. 2d 153 (Tex. Civ. App. 1954, N.R.E.).

The test for determining whether public property is tax exempt because used for a "public purpose" is whether it is used primarily for the health, comfort and welfare of the public. *A. d. W. Consolidated Independent School District v. City of Brown*, 184 S.W. 2d 914 (Tex. Sup. Ct. 1945). Public education is recognized as a function of State government. *Cassman v. Corsaline Academy, supra*. There can be no doubt that the maintenance of a public school is a public purpose as envisioned by Article 8, Section 2, Texas Constitution. Therefore, this opinion is concerned with the exemption accorded to "public property used for public purposes" by Sections 1 and 4 of Article 7159, Texas Revised Civil Statutes.

From *S. Edwards's College v. Waters, supra*, we quote:

"Public schools, colleges, and academies may, under authority of law, be established for the purpose of giving instruction in . . . agriculture, or other pursuit, which can be done practically only by having lands which may be used for the purpose of giving practical instruction, and in such a case all the buildings and

land used for such a purpose would evidently be exempt."

On the authority of this case it is apparent that all the property described as "Property Held Pursuant to the Educational Use Plan," (with the exception of the four buildings which are temporarily excess to the needs of said plan and which are being rented) is exempt from taxation.

The exemption accorded to "public property used for public purposes" is not lost even though such property may be temporarily leased or rented, so long as the public purpose of the property has not been abandoned, and so long as the revenue from such renting or leasing accrues to the public benefit. *State v. City of Beaumont*, 161 S.W. 2d 244 (Tex. Civ. App. 1942, no writ history); *City of Houston v. State*, 113 S.W. 2d 631 (Tex. Civ. App. 1938 Error Dismissed.)

In your letter you state that it is contemplated that the property described as "Property Owned Outright by Texas Tech," and the four buildings listed under "Property Held Pursuant to the Educational Use Plan" which are temporarily excess to the needs of such plan, will eventually be used in connection with the educational use plan and are being held for that purpose. You further state that the income from all rentals is credited to the PayTech Funds Account and is used solely for the promotion of the educational program. It is therefore apparent that the property described as "Property Owned Outright by Texas Tech" and the four rented buildings listed under "Property Held Pursuant to the Educational Use Plan" are also exempt from taxation.

SUMMARY

The property held by Texas Technological College pursuant to the Educational Use Program is exempt from taxation under the laws of the State of Texas on the grounds that such property is the property of a public college used in connection with the college's educational program. The remainder of the property is also exempt from taxation under the laws of the State of Texas though temporarily leased or rented by reason of its being public property "held" for public purposes, since the public purpose of such property has not been abandoned and all revenues therefrom come to the benefit of Texas Tech and are used solely for the promotion of the educational program at PanTech Farms.

Very truly yours,

WILL WILSON

Attorney General of Texas

By Jack N. Price

Jack N. Price

Assistant Attorney General

JNP:df

APPROVED:

ORDINANCE COMMITTEE:

Geo. P. Blackburn, *Chairman*

C. Dean Davis

B. H. Timmins, Jr.

L. P. Lollar

Henry G. Braswell

REVIEWED FOR THE ATTORNEY GENERAL

By: W. V. Geppert

THE ATTORNEY GENERAL OF TEXAS
AUSTIN 11, TEXAS

Will Wilson
Attorney General

October 7, 1957

Opinion No. WW-270

Re: Whether or not the W. T. Grant Company, Dallas, Texas, is subject to taxation under the lease hold agreement referred to in Article 7173, R.C.S.

Hon. Robert S. Calvert
Comptroller of Public Accounts
Capital Station
Austin 11, Texas

Dear Mr. Calvert:

You request the opinion of this office upon the ad valorem taxability of the lease hold estate of W. T. Grant Company in certain real estate located in Dallas, Texas, in which the University of Texas is the lessor and W. T. Grant Company is the lessee.

You submitted with your request a copy of the lease involved. It is dated December 12, 1946, and expires June 30, 1959. The real property covered by the lease is concededly State owned property and since it is for a term of more than three years its taxability is governed by Article 7173, Vernon's Civil Statutes, which provides in part as follows:

"Property held under a lease for a term of three years or more, or held under a contract for the purchase thereof, belonging to this State, or that is exempt by law from taxation in the hands of the owner thereof, shall be considered for all the purposes of taxation, as the property of the person so holding the same, except as otherwise specifically provided by law."

This Statute was construed by the Supreme Court of this State in the case of *Trammell v. Fawcett*, Tax Collector, 74 Tex. 557, 12 S.W. 317, as applicable to the leasehold estate and not to ownership of the fee in the following language which we quote from the opinion:

"... If appellant had held the lands under an absolute lease for a term of three years or more, his leasehold estate would have been subject to taxation upon such value as it would bring at a fair voluntary sale for cash, but he would not have been liable to taxes upon the value of the freehold estate in the lands."

Our research does not reveal that this ruling of the Supreme Court has been departed from. Article 7174, V.C.S., provides how such leasehold estate shall be valued. This Statute provides in part as follows:

"Taxable leasehold estates shall be valued at such a price as they would bring at a fair voluntary sale for cash."

You are, therefore, respectfully advised that the leasehold estate of W. T. Grant Company in the real property in question is subject to ad valorem taxes and the value should be ascertained as provided in Article 7174, V.C.S.

SUMMARY

A leasehold estate of the lessee in property owned by the State which is for a term of three or more years is subject to ad valorem taxation. The value should be ascertained as provided in Article 7174, V.C.S.

Very truly yours,

WILL WILSON

Attorney General

By L. P. LOLLAR

L. P. Lollar

Assistant

APPROVED:

OPINION COMMITTEE

Geo. P. Blackburn, *Chairman*

Joe Rollins

J. Milton Richardson

B. H. Timmins, Jr.

Houghton Brownlee, Jr.

REVIEWED FOR THE ATTORNEY GENERAL

By: James N. Ludlum

THE ATTORNEY GENERAL OF TEXAS

AUSTIN 11, TEXAS

Will Wilson

Attorney General

October 17, 1957

Opinion No. WW-281

Re: Taxability of City property under
lease to private industry.

Hon. William J. Gillespie

County Attorney

Lubbock County

Lubbock, Texas

Dear Mr. Gillespie:

In connection with your letter requesting our opinion relative to the captioned matter, you submit the following factual situation:

"The City of Lubbock holds title to a certain tract of real property in Lubbock County which is dedicated to use as the Lubbock Municipal Airport. Such property, being used for public purposes in the past has been exempt from taxation under the express provisions of R.S. Art. 7150.

"On September 15, 1955, the City, through its director of Aviation entered into a lease of a portion of the airport property to the West Texas Compress and Warehouse Company, a Texas Corporation domiciled in Lubbock, hereinafter called lessee.

"The lessee is to use the land for warehouse purposes, and the Airport Board has determined that it is in the public interest that the lessee have such privilege.

"The lease is for a term of five years beginning October 1, 1955, and ending September 30, 1960, with the lessee to pay \$1,100 a year to the City during that period. The lessee is also to erect five metal clad warehouse buildings on the site, which buildings shall become the property of the City by September 30, 1960, the City being conveyed a 1/60 interest in each of said buildings each month during the first five years of the lease. The lessee is further given an option for three consecutive five-year extensions, with a different yearly rental being due during each of those extensions.

"It was further agreed that should the contract lease be abandoned or breached before the initial five-year term was up, the City would have an option to purchase lessee's remaining interest in the buildings. If the City did not desire to exercise its option, then the lessee had the option to purchase the City's accrued interest, and upon payment the lessee could remove the buildings. The further terms of the lease appear in the copy of the lease attached hereto."

Specifically, you submit the following questions:

"(1) Has the land, by virtue of the change in the character of its use, lost its tax exemption?

"(2) Regardless of the tax consequences to the City, does the lessee's leasehold interest constitute a separate taxable interest?"

"(3) Does the lessee's diminishing interest in the buildings constitute a taxable interest to him?"

You state that the property in question "is dedicated to use as the Lubbock Municipal Airport." You also state, "... the property as a whole was acquired for the purpose of serving as an airfield. A great portion of that property has been utilized for that purpose, but the remaining tract (the property in question) has been turned over to private enterprise for a period of possibly 20 years."

The operation of an Airport by a city constitutes a public purpose. If the land in question is being held by the City for a future expansion of the airport, it is tax exempt unless and until the city has abandoned its intention to use the property in the future for a public purpose. *City of Abilene v. State*, 113 S.W. 2d 633 (Tex. Civ. App.); and *City of Dallas v. State*, 28 S.W. 2d 937 (writ refused).

Sec. 2, Art. VIII, of the Texas Constitution provides in part:

"but the legislature may, by general laws, exempt from taxation public property used for public purposes."

Sec. 9, Art. XI, of the Constitution of Texas, provides in part:

"The property of counties, cities and towns, owned and held only for public purposes, such as public buildings and the sites therefor, fire engines and the furniture thereof, and all property used, or intended for extinguishing fires, public grounds and all other property devoted exclusively to the use and benefit of the public shall be exempt from forced sale and from taxation. * * *"

Article 7150, V.C.S. provides that the following property is exempt from taxation:

"Sec. 4. All property, whether real or personal, belonging exclusively to this State, or any political subdivision thereof,

You will note that Sec. 4, of Article 7150, supra, purports to exempt all property, whether real or personal, belonging exclusively to this State, or any political subdivision thereof and does not contain the restriction that such property to be exempt must be *used for public purposes*. Counties and cities are political subdivisions of the State. However, Sec. 2 of Art. VIII, supra, of the Constitution only gives the Legislature the authority to exempt such property when *used for public purposes*. Therefore Sec. 4 is inoperative insofar as it purports to exempt public property regardless of its use in violation of said Sec. 2, Art. VIII of the Constitution, but is valid insofar as it exempts public property *used for public purposes*. *City of Abilene v. State*, 113 S.W. 2d 631.

Sec. 4a of said Article 7150 (not listed above) which requires power districts such as the Lower Colorado River Authority to pay certain amounts in lieu of taxes is unconstitutional. *Lower Colorado River Authority v. Chemical Bank and Trust Co.*, 190 S.W. 2d 48.

The Court held power districts to be political subdivisions of the State and as the property was devoted to a public use it was exempt from taxation under Sec. 9 of Art. XI of the Constitution, supra.

County and city property if actually held for a future public use is exempt although temporarily rented or leased. *State v. City of Houston*, 110 S.W. 2d 277. County and city property if used or held for public purposes is exempt, although not owned or held exclusively for such purpose. *State v. City of Beaumont*, 161 S.W. 2d 344.

The Test for determining whether "public property" is tax exempt is whether it is used primarily for the health, comfort or welfare of the public. To be used for public purposes it is not essential that it be used for governmental purposes. *A. d. M. Consol. Ind. Sch. Dist. v. City of Brown*, 184 S.W. 2d 914. That charges are made for use of public property does not withdraw it from its public character, if such charges are an incident to its use by the public and the proceeds inure to the benefit of the political subdivisions. *Id.*

Land acquired by a city for a public purpose, such as a site for a water reservoir, is tax exempt, although the city temporarily leases same for agricultural or other purposes, if the city has not abandoned its intention to build such reservoir. *City of Dallas v. State*, 28 S.W. 2d 937.

You are therefore advised that if the City is holding the property in question for a future expansion of the airport, or for other public purpose that it is tax exempt to the City.

Article 7173, Vernon's Civil Statutes provides:

"Property held under a lease for a term of three years or more, or held under a contract for the purchase thereof, belonging to this State, or that is exempt by law from taxation in the hands of the owner thereof, shall be considered for all the purposes of taxation, as the property of the person so holding the same, except as otherwise specifically provided by law."

Article 7174, Vernon's Civil Statutes provides:

"Taxable leasehold estates shall be valued at such a price as they would bring at a fair voluntary sale for cash."

The Supreme Court of Texas in *Tramwell v. Taught, Tax Collector*, 74 Tex. 557, 12 S.W. 317, held that the tax

able value of real property, taxable by virtue of Article 7173, supra, was the value of the leasehold estate and not the value of the fee. We answer your second question in the affirmative.

In reference to your third question it appears that on January 1, 1958, the City will own an undivided 3/60 of the improvements. This 3/60 interest will constitute a part of the leased premises and the value of same should be considered in arriving at the assessable value of the leasehold estate. On each succeeding January 1st, the City will own 12/60 additional interest in the premises and the assessable value of the leasehold estate will increase in value accordingly.

Article 7174, Vernon's Civil Statutes provides:

"Personal property, for the purposes of taxation, shall be construed to include . . . all improvements made by persons upon lands held by them, the title to which is still vested in the State of Texas, or in any railroad company, or which have been exempted from taxation for the benefit of any railroad company, or any other corporation whose property is not subject to the same mode and rule of taxation as other property."

It follows that on January 1, 1958, 3/60 of the value of the improvements should be assessed against the lessee as personal property owned by him. Each year thereafter he will own 12/60 less interest in the improvements and should be assessed accordingly. We appreciate the able brief which accompanied your request.

SUMMARY

Property held by a city for the purpose of future expansion of an airport or other public purpose is tax exempt to the city. A leasehold estate covering tax exempt property of a city if held under a lease for a term of three years

or more is taxable to the lessee and should be valued at such price as it would bring at a voluntary sale for cash. The interest of the lessee in improvements placed on the leased premises should be assessed for taxation as the personal property of the lessee.

Yours very truly,

WILL WILSON

Attorney General of Texas

By W. V. GEPPERT

W. V. Geppert

Assistant

WVG:vk

APPROVED:

OPINION COMMITTEE

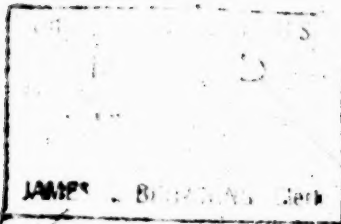
George P. Blackburn, *Chairman*

John B. Webster

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REVIEWED FOR THE ATTORNEY GENERAL

By: James N. Ludlum



In the
Supreme Court of the United States
OCTOBER TERM, 1959

No. 40

PHILLIPS CHEMICAL COMPANY, a Corporation,
Appellant,
v.

DUMAS INDEPENDENT SCHOOL DISTRICT,
Appellee.

On Appeal from the Supreme Court of the State of Texas

APPELLEE'S PETITION FOR REHEARING

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March 18, 1960.

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APPELLEE'S PETITION FOR REHEARING

Dumas Independent School District, the above named Appellee and Petitioner herein, presents this Petition for a Rehearing and, in support thereof, respectfully shows:

I

**The Court's Opinion Misconstrues the Appellee's Argument
Based on the Similarity of the Texas Statute and the
Michigan Statute.**

Appellee bases two important arguments on the similarity of the Texas statute and the Michigan statute. First,

the Michigan statute, held constitutional by this Court, effectively provides for the taxation of lessees of Federal property only, and does not provide for the taxation of lessees of other exempt property, when this statute is considered as a part of the Michigan taxing structure. Although this Michigan statute purports to apply to lessees of all exempt property, another section of the Michigan taxing statutes provide that where a tenant of real estate pays taxes thereon, he may deduct the same from his rent. Michigan Statutes Annotated, Section 7.97. While this statute is ineffective as against the sovereignty of the United States, it is effective as to the State of Michigan, which enacted the statutes, and all other owners of exempt property. Thus, all lessees of exempt property are effectively exempted from taxation, except only lessees of Federal property. This was recognized in the Michigan Courts in their decision of the Michigan cases. *Township of Muskegon v. Continental Motors Corporation*, 346 Mich. 218, 77 N. W. 2d 799.

Then, beginning at page 9 of the Slipsheet opinion, the Court said:

"The Michigan statute, although applicable generally to lessees of exempt property, contained an exception for property owned by state-supported educational institutions. Appellee's argument, essentially, is that the exemption of lessees of school-owned property from the Michigan statute supports the imposition here of a heavier tax on Federal lessees than is imposed on lessees of other exempt public property, in general."

Appellee respectfully shows the Court that this was not its argument. Rather, its argument was that the exception of school-owned property, together with the exception of a private use of exempt property "by way of a concession in or relative to the use of a public airport, park, market, fairground, or similar property which is available to the use of the general public," and the exception of Federal property for which payments are made in lieu of taxes, when considered together, result in exceptions so broad in scope that, if the Michigan statute were found in Texas at least, there would remain no exempt property used for private purposes that would be subject to taxation under the statute except Federal property, and that, presumably at least, essentially the same situation would be applicable in Michigan.

Item by item, Appellee attempted to point out to the Court that every example attempted to be given of State and local property subject to lease in Texas was property of a kind that would have been exempted from taxation under the Michigan statute. Even the warehouses at Pantex Ordnance Plant, leased to Appellant here, and which were the only examples of State property leased to private persons for profit cited by this Court in its opinion, consisted of nothing more than a small part of a large property owned by a state-supported educational institution. Again, Appellee respectfully urges to the Court that Appellant has not shown the Court one example of property in the State of Texas, owned by the State or its local subdivisions, that is leased to private persons, and that would be

subject to taxation under the terms of the Michigan statute, if that statute were enacted in Texas.

Thus, the real argument made by Appellee here is not that the exemption of property of State-owned educational institutions in Michigan is sufficient, in itself, to support any classification that the Texas Legislature might attempt to erect, but rather that the real and actual effect upon State and local taxation in Michigan under its statute is essentially identical to the real and actual effect of State and local taxation in Texas under its statute.

The evidence before the Trial Court in the Michigan cases was to the effect that the statute was enacted for the purpose of allowing taxation of Federal properties leased to private persons, and there was evidence that there were probably no more than three or four instances anywhere in the State where property other than Federal was made subject to taxation by the statute. It is easy to see why the government contended, in its appeal in the Michigan cases, that the Michigan statute was "special legislation" directed at government property. (Note 11, Slipsheet 10.) If the real purpose and effect of the Michigan statute was to tax Federal property, in a way and manner virtually identical with the result arrived at under the Texas statute, and only the wording and terminology of the statutes is different, and if in both cases the Appellant contended that the statute was invalid because it discriminated against Federal property in an unconstitutional way, then it is difficult to see how the second case can be

decided differently from the first case, without overruling or repudiating the first case.

If the Texas Legislature should, as a result of the decision in this case, enact the Michigan statute verbatim, it is not seen that any difference would result in tax consequences, either to the Appellant in this case, or to any other lessee of tax-exempt property in this State, from that which resulted under the statute now declared invalid by this Court. The warehouses and the igloos at Pantex Ordnance Plant would still not be subject to taxation, because they are property of a state-supported educational institution. There would still be no other properties in this State, of a similar nature of that leased to Appellant here, that would become subject to taxation by virtue of the enactment of the Michigan statute in Texas. This is the crux of Appellee's argument based on the Michigan statute, and Appellee still respectfully contends that it is a substantial and meaningful argument. As this Court said only two years ago, in *City of Detroit v. Murray Corporation of America*, 355 U. S. 489, 493:

"* * * but to strike down a tax on the possessor because of such verbal omission would only prove a victory for empty formalisms. And empty formalisms are too shadowy a basis for invalidating state tax laws. Cf. *Henneford v. Silas Mason Co.*, 300 U. S. 577. In the circumstances of this case the state could obviate such grounds for invalidity by merely adding a few words to its statutes. Yet their operation and practical effect would remain precisely the same."

The effect then, of this Court's decision that the Texas statute is invalid, when there is no evidence before the

Court that any different tax consequences would flow from a statute which this Court has approved, and to which approval it still adheres in its opinion here, would seem to be a victory for empty formalisms, and to be a determination of the invalidity of such statute resting merely on an examination of that statute itself, as if it were operating in a vacuum, a test which the Court has taken care to repudiate. (Slipsheet 7.)

II

The Court's Opinion Accords Undue Weight to the Proposition That the State of Texas and its Subdivisions Lease Valuable Property to Commercial and Business Enterprises, as Does the Federal Government, in View of the Extremely Limited Extent to Which This May Be True.

As will be more fully hereinafter urged, the record of the evidence and of the trial in this case reflects not one single example of industrial or commercial property leased by the State of Texas or its subdivisions to private business. Appellant attempted to remedy this defect of proof by going outside the record, and by citing several statutes and opinions of the Attorney General of Texas, all purporting to show instances where the State and its subdivisions lease their property to private persons. This was done by Appellant in its reply brief, filed only three days before oral argument, so that Appellee's only showing in rebuttal was in its oral argument. Point by point, and property by property, Appellee attempted to show in its oral argument

that all of the examples given were of non-industrial or non-commercial property, or of such a nature that they would have been excepted from taxation by the terms of the exemption provisions of the Michigan statute approved by this Court in 1958.

It was believed that this had been accomplished in such oral argument, until, after the conclusion of Appellee's argument, there came on for discussion by Appellant's Counsel the matter of certain warehouse facilities at Pantex Ordnance Plant, leased by Texas Technological College to Phillips Chemical Company. It then became apparent to counsel that the Court seemed impressed by this example, failing to find any distinction between this leasing and the leasing to the same lessee of Cactus Ordnance Works.

There is, however, a distinct and important difference, which the Court seems to have overlooked. Cactus Ordnance Works is a valuable industrial plant, erected and owned by the government for manufacturing purposes. The erection of a similar plant for itself would have cost Appellant in excess of \$30 million dollars. This entire plant is leased to Appellant for its private commercial purposes, at an annual rental that is only a fraction of the customary rental value of similar commercial properties.

The situation at Pantex Ordnance Plant, as reflected by the Attorney General's opinion appended to Appellant's reply brief, and cited by the Court (Note 8, Slipsheet 8), is quite different. There, Texas Technological College, a State educational institution, owns 6,000 acres of land

Out of an original 16,000 acre grant, 10,000 acres of which was recaptured by the government, part in fee and part for a 20-year term, for educational purposes. Out of all of this property, it appears that some seven warehouse buildings and 102 ammunition-storage "igloos" are temporarily excess to the educational needs of the college and are being leased. Surely this situation is more comparable to the leasing of concession space for a tailor shop in an army post exchange than it is to the leasing of an entire multi-million dollar industrial plant to a private corporation for profit. Yet, this is the example, and the only example, that this Court cites to support its view that there is found, in Texas, the leasing of State and local government property comparable to the leasing of Federal government property.

The Court says (Slipsheet 8) that "it is conceded that the State and its subdivisions lease valuable property to commercial and business enterprises, as does the Federal government." Except to the limited extent reflected by the above example, by certain limited concession-type leases, and certain rare instances that may perhaps be found of property of limited value with incidental commercial possibilities but not designed primarily for such purpose, Appellee must respectfully state that it does not so concede. Appellant has not pointed to one example of an industrial or manufacturing plant that is owned by the State of Texas or any of its subdivisions, and that either is or could be leased to a private entity. Neither the States nor its subdivisions own any such type of property. If a single example of such ownership and leasing could have been found, surely Ap-

pellant would have pointed it out to the Court, in place of pointing out Pantex Ordnance Plant, where on almost 9½ square miles of land, there is to be found leased only a few buildings and some storage igloos, with all the rest of the property being devoted to educational uses of the Department of Agriculture of Texas Technological College.

This Court has traditionally refused to decide issues not before it, and has refused to consider, in determining the validity of a statute, whether or not such statute might be invalid if differently applied from the way that it is applied in the case before the Court. As the statute was applied to Appellant here, it levied a tax upon Appellant's interest in the full and complete use of a commercial industrial plant. No attempt has been made under this statute to levy a tax upon a lessee from the Federal government of any property comparable to property owned and leased by the State or its subdivisions. Appellant attempted, in its oral argument to paint a picture of Cactus Ordnance Works on one side of the road, and Pantex Ordnance Plant on the other side of the road, both leased to Phillips Chemical Company, but with different tax consequences to the lessee by virtue of the different lessors involved. This picture is not accurate; it does not reflect the true situation found. If it did, then discrimination might be conceded; but in the case actually presented before the Court, the nature of the property interests leased on the two sides of the road are so different that no fair comparison may be made between them.

III

The Court's Opinion Fails to Give Sufficient Consideration to the Practical Operation and Effect of the Challenged Statute in View of the Nature of the Publicly-Owned Property in Texas.

When the Republic of Texas gave up its independence and became one of the United States in 1845, it was allowed to retain its public land in consideration of its retention of its public debt. Therefore, there is no general body of Federal public land in Texas. The property that the government owns in Texas is property that has been purchased or acquired for specific purposes. Thus, there are no Federal forest lands, grazing lands, or other similar types of Federal property in Texas. In spite of this fact, a recent bulletin of the General Services Administration released to the press, and generally reported since the opinion in this case was announced, states that Texas stands fourth among the states in the value of Federal property located in the State. This property, of course, consists of office buildings, military installations, industrial plants, and other related types of improved properties.

Yet, not a single example has been given in this case of Federal property that is leased to private persons except the type of property involved in this case, that is, industrial and commercial property being devoted to private profit. Therefore, when the Court states (Slipsheet 8) that "Article 5248 imposes its burdens on *all* (emphasis by the Court) lessees of Federal property," it can be seen that

this result is not so broad or all-inclusive as it might be in other states where the Federal government owns and leases grazing lands, mining lands, timber lands, and many other types of property.

It is true, as the Court says, that Appellee has argued that one basis for justifying the classification erected is the serious impact of this type of Federal leasing on the local governments involved, but the argument attempted to be made by Appellee goes farther than this. Not only is this impact serious because of situations such as is presented in Dumas, Texas, where this tremendous plant has created a serious problem of school financing for the Appellee, but also, it must be kept in mind that no where in Texas is there a similar situation presented where the lessor is the State or a local subdivision of government. Certainly the seven warehouses and the few igloos leased "as needed" by the Appellant at Pantex Ordnance Plant create no special problem for the school district or any other unit of government, where Pantex Ordnance Works is located.

Thus, as this statute is applied in this case, and as Appellee believes it should be applied in all other cases of Federal leasing in Texas, the result is to tax an industrial or commercial operation that is obtaining a wind-fall use of a large and valuable facility for its private profit, while competing with similar businesses that are required to make their own investment in order to have commercial or manufacturing facilities. By contrast, the occasional State or local lessee that is not taxed, or that is taxed at a lowed

rate or valuation, is to be found using a part only of some State or local property, such as an occasional temporarily un-needed warehouse or storage facility, an unused building at an airport, concession-type facilities in a public building, or some other similar property.

In this case, the Court has reached its decision as if there had been presented to it a question of what might happen under this statute, rather than what has happened. Seldom has this Court gone so far in striking down a State statute merely because, if the statute had been differently applied or had been applied to a different situation, it would be invalid. It will be time enough to declare this statute unconstitutional as applied, if Texas or its political subdivisions attempt to levy, under its authority, taxes upon the blind man who sells cigarettes and candy in the post office lobby, the company that operates a dry cleaning pick-up station at the army post exchange, and other similar users of Federal facilities. As it was applied in this case, however, the Texas statute did not attempt to levy such a tax, but levied a tax upon a type of lessee whose counterpart is not to be found leasing or using State or local property.

IV

The Court Has Decided This Case as Though the Discrimination Found Had Been Proved, When the Record Is Actually Devoid of Any Evidence Showing Discrimination in Fact.

Appellant had urged at all stages of this proceeding that Article 5248 is invalid on its face, because it applies

only to private users of Federal property. This Court has correctly stated that a determination of this invalidity cannot rest merely on an examination of that article alone, since it does not operate in a vacuum, and that "first, it is necessary to determine how other taxpayers similarly situated are treated." (Slipsheet 7.) The Court then says that "such a determination requires 'an examination of the whole tax structure of the state'." (Slipsheet 7.) Thus, the Court recognizes that this is the important and crucial phase of this case, and yet it has made its examination of this key question in the half-light cast by the sometimes vague and erroneous and always unsupported assertions to be found in Appellant's briefs and arguments, and not to any extent in proof made in the traditional manner.

Appellant was plaintiff in the Trial Court, and both for that reason and because there is a presumption of validity inhering in a State statute, it had the burden of showing that the statute in question is unconstitutional. From the beginning, it has attempted to meet this burden by argument rather than proof. This Court characterized the position that Appellant has taken throughout these proceedings as follows: "Phillips argues that because Article 5248 applied only to private users of Federal property, it is invalid for that reason, without more." (Slipsheet 6.) Apparently believing that this argument was sufficient to carry the day, Appellant brought no evidence in the Trial Court to show that any other lessee of comparable property from a different kind of lessor was taxed differently from itself. It brought no evidence to show that there is a single

property of a similar kind, in size, quality, character of use, or otherwise, that is owned by the State of Texas or any of its subdivisions, and that is leased to private users for profit.

Not until Appellant reached this Court did it decide that perhaps it should have some evidence on this question. It then set about attempting to supply this evidence, outside the record, by bringing it forward in briefs. In its main Brief, it gave only one example, that of oil and gas lands owned by the State and its subdivisions. (Appellant's Brief, p. 29.) As was pointed out by Appellee in its Brief, this example was not pertinent, because it is well known that the lessee's interest in these oil and gas lands is fully taxable. In its Reply Brief (pp. 7-8), Appellant attempted to list additional examples of property leased by the State and its subdivisions, but as Appellee attempted to show in its oral argument, not a single example among these is of property comparable in any way to the industrial and commercial property that is before the Court in this case.

Yet, even assuming that the examples given by the Appellant in its briefs would show discrimination in fact, even after actual testimony were brought to show the nature and extent of such leasing without taxation, it still remains true that these matters are not in evidence in this case. Thus, in finding discrimination in fact, as this Court apparently has done, the Court has supplied for Appellant, at this late stage in the proceedings, the missing proof. Appellee respectfully contends that this does not accord with this Court's usual function of deciding

cases upon the record below. Customarily, Appellate Courts, including this Court, when a defect of proof is found and it appears that upon further consideration, a different case might be presented, will do no more than reverse and remand the case for further trial, in order that the proof may be made in the proper manner, at the Trial Court level, and with both sides, not just one, having an equal opportunity to show what the facts actually may be.

This Court has traditionally refused to reach constitutional questions when a case may be decided, upon the record before it, without reaching them. Appellee respectfully urges that this case merits affirmance upon the ground that the record fails to show any discrimination in fact, whether or not such discrimination might be shown by a more complete examination of available evidence. In the alternative, if the Court feels that the constitutional question is so closely approached that an affirmance would not be warranted, then Appellee respectfully suggests that the case be reversed and remanded for further proof. If this case reflected a situation where the State and its subdivisions were leasing comparable property to private users who were escaping taxation, or if this case concerned itself with the taxation of lessees of Federal property of a type that the State and its subdivisions may lease to private users, then in either event, it might be conceded that the case should be reversed, but where neither the record in the case nor fair inferences from the extraneous matters injected into the case at the Appellate level show

either of these situations to exist, then Appellee respectfully contends that the case should not have been reversed and the statute held unconstitutional.

V

The Court's Opinion Contrasts Sharply With Its Almost Unbroken Line of Decisions in This Field for More Than Twenty Years, Culminating in the 1958 Michigan Cases.

This Court has decided many cases in the field of inter-governmental tax immunity. The first and most important of these, *McCulloch v. The State of Maryland*, 4 Wheat. 316, was founded upon the proposition that where two sovereignties operated in the same area at the same time, then neither should have the power to tax the operations of the other, because the power to tax involves the power to destroy. This Court well knows how, for a period of more than one hundred years thereafter, this doctrine was applied, or mis-applied, in case after case. Without burdening the Court with the cases, already cited in briefs in this appeal and all familiar to the Court, it is remembered that the doctrines were stretched to the point that it was even held that the Federal government could not levy an income tax on the salary of a state or local employee, an oil and gas lessee of Federal lands could not be taxed on his leasehold, there could be no taxation of a Federal copyright or patent, and many other examples in this same vein.

The Court also knows, however, that this trend of decisions was sharply reversed during the 1937 term, and that since that time, the Court has attempted to discover, in each case, whether or not the dual system of government was actually being challenged in the levying of the questioned tax. As a result, many of the older cases were overruled, and now, for example, the Governor of Texas pays Federal income taxes, and the District Director of Internal Revenue in New York pays State income taxes; copyrights, and patents are subject to taxation; contractors with the Federal government pay State use taxes; and many taxes which would have been declared invalid fifty years ago are now common-place.

It is recognized, of course, that the decisions of these last twenty years do not represent a changed interpretation of the Constitution and what is required in this field, but rather that they represent a return to the orthodoxy of correct constitutional interpretation, and a repudiation of the heresies of the late Nineteenth and early Twentieth Centuries. In short, it might fairly be said that the position of this Court of late has usually been that if the tax is not a direct tax against the government on its property, the tax is valid.

Yet, in this case, not only is the tax levied against a private property interest, rather than a government property interest, but, as the Court expressly recognizes in its opinion, Congress has consented to the taxation of this private property interest, thereby waiving any claim of governmental immunity. This point will be touched upon

more fully in the next subdivision of this petition, but for the present, Appellee again respectfully urges that this decision is completely out of harmony with the recent decisions of this Court, more fully cited in earlier briefs, recognizing the broad powers of taxation and classification reserved to the states by our Constitution.

VI

The Court's Opinion Treats This as a Case Involving Intergovernmental Tax Immunity, While at the Same Time Recognizing That the Property Interest Taxed Is Specifically Made Taxable by Congress, Thereby Waiving Any Claim to Immunity.

This Court has correctly held and indicated in its opinion that the property interest here taxed is a private property interest, and not an interest in Federal property: "Phillips' use of the government's property, by way of contrast, is not exempt." (Slipsheet 6.) Yet, the Court insists that decisions in the intergovernmental tax immunity field are controlling: "But we have made it clear, in the equal protection cases, that our decisions in that field are not necessarily controlling where problems of intergovernmental tax immunity are involved." (Slipsheet 9.) While thus recognizing that Congress has created a type of taxable private property interest, and has expressly made the same taxable by the states, yet this Court has withdrawn some of this waiver of immunity and has, in effect, stated that where a private property interest is federally-created, or federally-related, a different rule will be applied to it from the

rule that would be applied if it were otherwise created or related.

In so doing, the Court has departed from established precedents, and has erected a protective shield about lessees from the Federal government not heretofore found. As Mr. Justice Holmes said many years ago, "When an interest in land, whether freehold or for years, is severed from the public domain and put into private hands, the natural implication is that it goes there with the ordinary incidents of private property, and therefore is subject to being taxed." *Trimble v. City of Seattle*, 231 U. S. 683. Further, this Court has held that when Congress has created a type of taxable private interest, or has consented to the taxation of a Federal interest, that no uniformity of such taxation is required by Federal law, and such taxable interest is subject to the ordinary principles of State taxation. *Reconstruction Finance Corporation v. Beaver County, Pa.*, 328 U. S. 204.

What prohibited interference with the United States and its activities is to be found in the statute now before this Court? What is the "government's interest" that must be weighed in the balance?

Will the addition of a state ad valorem tax to the cost of doing business in the leased premises cause potential lessees of property of this type to reject the proffered leases? Surely a negative answer to this question is manifest. How important are a few thousand dollars more in taxes on a lease with an annual rental in excess of \$1 million dollars?

Further, where else could this lessee obtain a manufacturing plant suitable to its needs without building or buying it? Certainly it could not lease it from the State of Texas or its subdivisions, since they own no such plants. Surely this Court recognizes that the government is not in competition with anyone in leasing its surplus plants. Private industry just does not own this tremendous store of surplus manufacturing facilities, nor do the states and local governments own them. And still further, what other property does the Federal government lease in Texas than industrial plants of this kind? Nothing else has been shown to be so leased.

Further, if the impact to be considered is economic, this Court has frequently held that this is of no importance. *James v. Dravo Contracting Company*, 302 U. S. 134; *Alabama v. King & Boozer*, 314 U. S. 1.

Still further, in this case, and it is this case with which we are concerned, there is evidence which would show that the action of this Court in reversing the judgment below will actually cost the United States money, rather than save it money. The evidence shows that the United States now pays a considerable sum of money each year to Appellee School District as a Federal grant, because of the economic impact of this plant upon the school district. This grant would be reduced by the amount of taxes paid, or would be eliminated if the taxes were higher than the grant, thereby resulting in a saving to the United States. On the other hand, the terms of the lease itself, as shown in the record (p. 76), provides that there would be no

decrease in the rent to the United States by virtue of taxation of the lessee's interest in this property. In other words, Appellant's taxes on its property interest are now paid by the United States, while under the holding of the Texas Courts, it would have to pay its own.

This Court does not intimate, in its opinion, that the classification erected by the State of Texas in this instance is so palpably arbitrary or unreasonable to be invalid, absent some relation to the intergovernmental tax immunity field. In fact, by finding it necessary to weigh the government's interest in the balance, the Court has intimated the contrary. Appellee again respectfully contends that the classification is not arbitrary, with or without a consideration of any possible interest of the United States.

VII

**The Court Erroneously Construed One Point of Texas Law,
On a Point Not Necessary to the Decision of the Case in
Any Event, and This Construction Should Be Deleted
From the Opinion of the Court.**

At Slipsheet 4, the Court stated that, because the lease in this case is subject to termination, it is not a lease for three years or more and is therefore not subject to taxation under Article 7173, Revised Civil Statutes of Texas.

In the first place, no question of the taxability of the leasehold of Phillips under Article 7173 was presented to the Court, no decision on the matter was requested of the Court, the matter was not raised in the jurisdictional state-

ment, and therefore this dictum by the Court is unwarranted.

Further, the opinion of the Court below, on this question of purely local law, effectively overruled the earlier Texas case cited by the Court, *Trammell v. Faught*, 74 Tex. 557, 12 S. W. 317.

Therefore, the statements of this Court in its opinion with respect to the above matters should be deleted therefrom, and rehearing of this cause should be granted for the purpose of so doing, and for the purpose of allowing Appellee to show unto the Court the propriety of this request.

CONCLUSION

Your Petitioner respectfully submits that upon both reason and authority, and as applied in this case; Article 5218 of the Revised Civil Statutes of Texas does not discriminate unconstitutionally against lessees from the Federal government, in that the statute is applied in this case only to a private corporation leasing from the Federal government substantial property of a commercial and industrial nature, and that there is no counterpart to be found in Texas to this type of lessee, in that neither the State nor its local subdivisions own any property of a similar nature; and that, particularly in this case, where there is no evidence to support a finding of discrimination, the Court should not rely upon inferences and purported showings outside the record of the existence of similar leases which do not in fact exist, to overturn this statute. Further, where a statute could be written that would, on its

face, eliminate the apparent defects found by this Court to exist in the Texas statute, under which substitute statute there would be no substantial difference, if any, in tax consequences from that found under the present statute. then the statute in question should not be declared invalid.

Therefore, your Petitioner respectfully represents that a rehearing should be granted and that the decision of the Courts below should be affirmed; and in the alternative, if this Court is of the opinion that a further trial upon the merits would show in fact the discrimination which this Court believes to exist, then that this Court should at least offer the opportunity for such re-trial by granting a rehearing herein, and by reforming its opinion to direct that the fact issue of discrimination be re-tried in the Courts below.

Respectfully submitted,

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March 18, 1960.

CERTIFICATE OF COUNSEL

I, Earnest L. Langley, Counsel for the above named Petitioner, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

Counsel for Appellee 